TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 567.

CALVIN BRANSON AND NATHAN LINDSEY, PLAINTIFFS IN ERROR,

vs.

JACOB WIRTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Jacob Wirth, plaintiff, and Calvin Branson and Nathan Lindsey, defendants, a manifest error hath happened, to the great damage of the said Calvin Branson and Nathan Lindsey, as by their complaint appears, we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of De-
2 cember next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this sixth day of July, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-sixth year.

[SEAL.]

J. A. JONES,
Clerk of the Circuit Court of the United States for the Southern District of Illinois.

3 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the honorable David Davis, presiding judge, and the honorable Samuel H. Treat, associate judge of said circuit court, on Friday, the thirtieth day of June, in the June term of said court, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-fifth year.

J. A. JONES, *Clerk.*

JACOB WIRTH
vs.
CALVIN BRANSON AND NATHAN LINDSEY. } In ejectment.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Jacob Wirth, plaintiff, a citizen of the State of New York, puts in his place Messrs. McClernand & Broadwell, his attorneys, against Calvin Branson and Nathan Lindsey, defendants, citizens and resi-
4 dents of the said southern district of Illinois, in a plea of trespass and ejectment.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, heretofore, to wit, on the twenty-first day of June, in the June term of said court, in the year of our Lord one thousand eight hundred and sixty-nine, in open court, came said plaintiff, by his said attorneys, and filed in the clerk's office of said court his declaration in ejectment against the defendants, together with a notice in writing thereto attached; and also an affidavit of a due service of a

true copy of said declaration and notice upon the defendants; and also at the same time filed his bond for costs in said entitled cause; which said bond for costs, declaration, notice, and affidavit are in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Circuit court. June term, A. D. 1869.

JACOB WIRTH
vs.
CALVIN BRANSON ET AL. } In ejectment.

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party, or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 21st day of June, 1869.

W'M E. KEEFER.

(Indorsed:) Filed June 21st, A. D. 1869. J. A. Jones, clerk.

Declaration.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In circuit court of said district to June term, A. D. 1869.

Jacob Wirth, the plaintiff in this suit, who is a citizen of the State of New York, one of the United States of America, by McClernand and Broadwell, his attorneys, complains of Calvin Branson and Nathan Lindsey, the defendants, who are citizens and inhabitants of the State of Illinois, one of the United States of America, of a plea, wherefore they, the said defendants, with force and arms, &c., entered into the following-described premises; for that, heretofore, to wit, on the first day of May, A. D. 1869, the said plaintiff was possessed of certain premises situated in the county of Fulton, and State of Illinois, and described as follows, to wit: The northeast quarter of section eighteen, (18,) township four (4) north, of range two east 4th principal meridian; and, being so possessed thereof, the said defendants afterwards, to wit, on the twentieth day of May, A. D. 1869, entered into such premises, and that they unlawfully withhold from the said plaintiff the possession thereof; and the said plaintiff avers that he claims title to said premises in fee; wherefore said plaintiff says that he is injured, and has sustained damages to a large amount, to wit, one thousand dollars. And therefore he brings suit, &c.

McCLERNAND & BROADWELL,
Att'ys for Plaintiff.

(Indorsed:) Filed June 21st, A. D. 1869. J. A. Jones, cl'k.

Notice.

To Calvin Branson and Nathan Lindsey, defendants in this suit:

Take notice—1st. That, on the twenty-first day of June, A. D.
7 1869, and during the June term of the circuit court of the United States, within and for the southern district of Illinois, a declaration, of which the foregoing is a copy, will be filed in said court. 2nd. That, upon filing the same, a rule will be entered requiring you, such defendants, to appear and plead to such declaration within twenty days after the entry of such rule. 3rd. That, if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises described in said declaration.

Dated at Springfield this second day of June, A. D. 1869.

McCLERNAND & BROADWELL,
Att'ys for Pl'ff.

(Indorsed:) Filed June 21st, A. D. 1860. J. A. Jones, cl'k.

Affidavit.

STATE OF ILLINOIS, *Fulton County, ss:*

Charles Baumgarten, being duly sworn, upon oath says that he served a declaration and notice, of which the within and foregoing are
8 copies, upon Calvin Branson and Nathan Lindsey, the above-named defendants, by delivering the same to them personally on the 11th day of June, A. D. 1869.

CHA'S BAUMGARTEN.

Subscribed and sworn to before me this 11th day of June, A. D. 1869.

[L. S.] GEO. WHITAKER,
Notary Public.

(Indorsed:) Filed June 21st, A. D. 1869. J. A. Jones, cl'k.

Whereupon, on the same day of the month, in the term and year aforesaid, the following proceedings were had in said court in said entitled cause, and entered of record, to wit:

Order of court.

JACOB WIRTH
vs.
CALVIN BRANSON AND NATHAN LINDSEY. } In ejectment.

Now comes the plaintiff, by Messrs. McClernand and Broadwell, his attorneys, and files his declaration in ejectment against the said defendants, together with a notice in writing thereto attached, and affidavit of due service of true copies of said declaration and notice upon the
9 defendants. Upon reading thereof, it is ordered, on motion of the plaintiff, that this cause be docketed, and the defendants ruled to plead in twenty days, or that their default be entered.

Afterwards, to wit, on the sixth day of July, in the term and year aforesaid, came said defendants, by S. C. Judd, esq., their attorney, and filed in said clerk's office their pleas herein; which said pleas are in the words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA:

U. S. circuit court, southern dist. of Illinois. June term, 1869.

JACOB WIRTH
vs.
CALVIN BRANSON & NATHAN LINDSEY. } Ejectment.

1. And the said defendants, by S. C. Judd, their attorney, come and defend the wrong and injury, when, &c., and say that they are not guilty of unlawfully withholding the said premises claimed by said plaintiff, in manner and form as alleged in said declaration; and
10 of this they put themselves upon the country, &c.

S. C. JUDD,
Att'y for Def'ts.

And plaintiff comes & doth the like, &c.

McCLERNAND & BROADWELL,
Att'y for Pl'ff.

2. And for further plea in this behalf, the said defendants say that the said defendant Calvin Branson is not, and at the commencement of the suit was not, in possession of thirty acres off from the west side of the said premises, nor of any part thereof; nor is the said defendant Nathan Lindsey in possession of one hundred and thirty acres off the east side of said premises, nor of any part thereof, nor was he, at the commencement of this suit, in possession of the same, or any part thereof. And this they are ready to verify, &c.

S. C. JUDD,
Def'ts' Att'y.

(Indorsed:) Filed July 6, 1869. J. A. Jones, cl'k.

Now, afterwards, to wit, on the tenth day of January, at the
11 January term of said court, in the year of our Lord one thousand eight hundred and seventy, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order of court.

JACOB WIRTH
v.
CALVIN BRANSON ET AL. } In ejectment.

This day come the parties, by their attorneys, and the defendants withdraw their 2nd plea herein, and, issue being now joined, the trial of this cause, by consent, is submitted to the court. And the court having heard the evidence of the parties, the argument is postponed to a future day of this term.

Afterwards, to wit, on the twelfth day of January, in the term and year last aforesaid, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

Order of court.

JACOB WIRTH
v.
CALVIN BRANSON ET AL. } In ejectment.

This day come again the parties, by their attorneys, and the
12 court, having heard further proof and allegations and argument of counsel thereon, takes the same under advisement.

And afterwards, to wit, on the nineteenth day of February, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

1st judgment.

JACOB WIRTH
v.
CALVIN BRANSON AND NATHAN LINDSEY. } In ejectment.

This day come again the parties, by their attorneys, and the court being now sufficiently advised in the premises, finds for the plaintiff, and that the defendants are guilty of unlawfully withholding from the plaintiff the possession of the premises in his declaration described, to wit, the northeast quarter of section eighteen, (18,) township four (4) north, of range two (2) east of the fourth principal meridian, in the county of Fulton, and State of Illinois, and to which the plaintiff
13 is entitled in fee-simple. It is ordered that a writ of possession issue therefor—said writ not to issue until the further order of this court. It is therefore ordered and adjudged that the plaintiff recover of the defendants one cent damage, together with the sum of twenty-four dollars, his costs and charges by him about his suit in this behalf expended, and that he have execution therefor.

Whereupon defendants enter their motion for a new trial herein.

Now afterwards, to wit, on the twenty-fifth day of June, at the June term of said court, of the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order of court.

JACOB WIRTH
v.
CALVIN BRANSON ET AL. } In ejectment.

This day this cause came on to be heard upon the motion for a new trial herein, and the court not being sufficiently advised in the premises takes the same under advisement.

14 Then, afterwards, to wit, on the thirteenth day of July, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order of court.

JACOB WIRTH
v.
CALVIN BRANSON ET AL. } In ejectment.

This day come the defendants, by S. C. Judd, esq., their attorney, and enter their motion to set aside the judgment rendered in this cause on

the nineteenth day of February, A. D. 1870, and for a new trial at common law; and the court being sufficiently advised in the premises, sustains said motion, and this cause is continued.

Afterwards, to wit, on the twenty-fourth day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and seventy-one, the following further proceedings were had in said court in said cause, and entered of record, to wit:

15 *Order of court.*

JACOB WIRTH
v.
CALVIN BRANSON ET AL. } In ejectment.

It is ordered by the court that this cause be continued for trial by full bench.

And afterwards, to wit, on the twenty-seventh day of said January, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order of court.

JACOB WIRTH
v.
CALVIN BRANSON ET AL. } In assumpsit.

On motion of plaintiff, by Messrs. McClernand and Broadwell, his attorneys, leave is granted to return deed from Eli B. Clemson and Ann M. Clemson to John Shaw to General Land Office, upon filing a copy of the same herein.

Now, afterwards, to wit, on the thirtieth day of June, at the June term of said court of the year last aforesaid, the following
16 further proceedings were had in said court in said cause, and entered of record, to wit:

2nd judgment.

JACOB WIRTH
v.
CALVIN BRANSON AND NATHAN LINDSEY. } In ejectment.

This day comes as well the plaintiff, by Messrs. McClernand and Broadwell, his attorneys, as the defendants, by S. C. Judd, esq., their attorney, and, issue being joined, whereupon comes a jury of good and lawful men, to wit, O. B. Heistand, Isaac Pilcher, John Busher, Asahel Coe, Adam A. Goodrich, William S. Hurst, Patrick Conner, Zachariah Maxcy, Jacob Alyea, James C. Minton, William C. Griffith, and Henry Seibert, duly elected, tried, and sworn to try said issue, and, having heard the evidence and argument of counsel, for verdict say "We, the jury, find the issue for the plaintiff, and that the defendants are guilty of unlawfully withholding from the plaintiff the possession of the real estate and premises in his declaration described, to wit, 'the
17 northeast quarter of section eighteen, (18,) township four (4)

north, of range two (2) east of the fourth (4th) principal meridian, in the county of Fulton, and State of Illinois, and to which the plaintiff is entitled in fee-simple.'"

Whereupon the defendants enter their motion for a new trial herein, which, being heard by the court, is overruled.

It is, therefore, ordered and adjudged by the court, that the plaintiff recover of defendant possession of said premises, according to the force and effect of said recovery, and that a writ of possession issue therefor.

It is also ordered that the plaintiff recover of the defendants the sum of one cent damages, together with the sum of thirty dollars and ninety cents, his costs and charges, by him about his suit in this behalf expended, and that execution issue therefor.

Then, afterwards, to wit, on said thirtieth day of June, of the year last aforesaid, came again said defendants, by S. C. Judd, esq.,
18 their attorney, and filed in the clerk's office of said court their bill of exceptions herein; which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of Illinois.
June term, A. D. 1871.

JACOB WIRTH
vs.
CALVIN BRANSON & NATHAN LINDSEY. } Ejectment.

Be it remembered that, at the trial of this cause at the present term of this court, before the court and a jury, the plaintiff, to sustain the issues on his part, offered and read in evidence to the jury a patent from the United States to Edward F. Leonard for the northeast quarter of section number eighteen, (18,) in township number four (4) north of the base line of range two (2) east of the fourth principal meridian, "in the district of lands subject to sale at Springfield, Illinois," which patent bears date on the 20th day of February, A. D. 1868. The said
19 plaintiff thereupon offered and read in evidence to the jury a deed for the same tract of land from Edward F. Leonard to the plaintiff, Jacob Wirth, dated the 24th day of April, A. D. 1869.

And here the plaintiff rested his case.

The defendants, to sustain the issues on their part, offered and read in evidence to the jury, a duly-exemplified copy of a land warrant, No. 13598, and of a memorandum and indorsement thereon, exemplified and authenticated by the Commissioner of the General Land Office, June 1st, 1870; which land warrant and memorandum and indorsement thereon, read as follows:

"No. 13598. Giles Egerton, sergeant 26 Infantry.

"No. 13598. Pursuant to the second section of an act of Congress, passed the 6th of May, 1812, authorizing the Secretary of War to issue land warrants to the non-commissioned officers and soldiers enlisted in the service of the United States, conformably to the acts of the 24th

of December, 1811, and the 11th of January, 1812, Giles Egerton, late a sergeant in the company commanded by Captain Salmon C. Cotton, of the 26 Regiment United States Infantry, is entitled to one hundred
20 and sixty acres of land, to be located agreeably to the said act on any unlocated parts of the six millions of acres appropriated by law for the original grantees of such military warrants: and this warrant is not assignable or transferable in any manner whatever.

"Given at the War Office of the United States, this 3 day of December, A. D. one thousand eight hundred and seventeen.

"GEO. GRAHAM,
"*Acting Secretary of War.*

"Registered.

"NAT. CUTTING, *Clerk.*"

(Endorsed:)

"Loc'd 10 Jan'y, 1818, Ill's, page 474."

The defendant then proved by an exemplification of the records of the General Land Office, at Washington, that the said above land warrant was located according to law, on the 10th of January, A. D. 1818, in favor of said Giles Egerton, (serg't', &c., Cotton's Company, of the 26th Regiment of Infantry,) on the said northeast quarter of section
21 eighteen, township four north, range two east fourth principal meridian, in the military bounty lands in Illinois.

Said defendant thereupon offered and read in evidence to the jury an exemplified copy, (from the record of "Illinois military bounty land patents" in the General Land Office, at Washington,) of a patent from the United States to said Giles Egerton, dated the 10th day of January, A. D. 1818, granting to said Giles Egerton the said "northeast quarter of section eighteen (18) of township four (4) north, in range two (2) east, in the tract appropriated by acts of Congress for military bounties in the Territory of Illinois." The said patent recites "that, in pursuance of acts of Congress, appropriating and granting land to the late Army of the United States, passed on and since the sixth day of May, 1812, Giles Egerton having deposited in the General Land Office a warrant in his favor, numbered 13598, there is granted unto the said Giles Egerton, late a sergeant in Cotton's Co. of the 26th Reg't of Infantry, a certain tract of land containing one hundred and sixty acres, be-
22 ing the northeast quarter of section eighteen," &c., as above described.

On the margin of the said exemplified copy of said patent, is a memorandum, copied as follows, viz: "(Endorsed:) This patent was iss'd for the S. E. ¼, instead of the N. E. ¼, as recorded; sent certificate of that fact to E. B. Clemson, at Lebanon, Ill's. See his letter of 19 May, 1826."

(The word "Endorsed" in said memorandum is in black ink, and the rest of the memorandum is in red ink.)

The defendants objected to the reading of said memorandum in evidence, but the court permitted it to read to the jury at the instance of the plaintiff, and the defendant excepted.

The said defendants then offered and read in evidence a deed, dated the 29th day of July, A. D. 1819, from said Giles Egerton to Thomas Hart, duly recorded in the recorder's office of the county in which the land was situated, on the 3rd day of January, 1820, and which deed grants to said Hart, from and by said Egerton, real estate by the following description, viz: "The southeast quarter of section eighteen, of

township four north, in range two east, in the tract appropriated
23 by the acts of Congress to the late Army of the United States, in the State (once the Territory) of Illinois, which q'r section was granted to the said Giles in consideration of his military services, as will appear by a patent obtained from the General Government, dated the 10th day of January, A. D. 1818."

The defendants then offered and read in evidence to the jury an exemplified copy of a patent from the United States to James Durney, dated on the 7th day of January, A. D. 1818, granting to said "James Durney, late a private in Oglevie's Company, of the 13th Regiment of Infantry," the southeast quarter of section eighteen, of township four north, in range two east, in the tract appropriated (by the acts aforesaid) for military bounties in the Territory of Illinois."

Said patent refers to the deposit, &c., of land warrant No. 5144, &c., as the basis of the grant.

The defendants thereupon offered and read in evidence to the jury a deed from the sheriff of Fulton County, Illinois, (in which county the land is located,) to Timothy Gridley, dated November 14th, A. D.
24 1843, (and recorded in the recorder's office of said county, on the 30th day of September, A. D. 1845,) for the northeast quarter of said section eighteen, township four north, range two east of the fourth principal meridian, in Fulton County, Illinois, for the taxes, &c., for the year 1839, and under a judgment for same at the June term, 1840, of the circuit court of Fulton County, Illinois, aforesaid. And said defendants also offered and read in evidence to the jury several mesne conveyances from said Timothy Gridley to themselves, inclusive, for said northeast quarter of section eighteen aforesaid, by which whatever title or right said Gridley acquired under said sheriff's deed was regularly conveyed to them, (said defendants,) the said title and rights having been conveyed to them, said defendants, in February, 1849. And the said defendants also proved that they and their grantors had occupied, cultivated, and had full and undisturbed possession of the whole of said quarter section ever since November, 1843, the whole thereof being under fence and cultivation; and that for the years 1844 to
25 1868, inclusive, they and their grantors paid all the taxes and assessments levied or assessed on or against said land, they and their grantors paying respectively, when they respectively owned and held said land under such title.

It was proved that the land in controversy was worth more than $2,000. And here the defendants rested their case.

The plaintiff then offered in evidence a certified copy of a deed from Thomas Hart to Samuel F. Hunt, dated the 12th day of May, A. D. 1824; also, a certified copy of a deed from Samuel F. Hunt to Eli B. Clemson, dated the 7th day of April, A. D. 1825, each for "the southeast quarter of section eighteen, (18,) township four north, range two east, in the tract appropriated for military bounties in the Territory, now State, of Illinois." To the reading in evidence of each or either of said deeds, the defendants then and there objected at the time such deeds were offered, respectively, as being irrelevant and incompetent, and as affording no proof bearing upon the matter in controversy;
26 but the court overruled said objection as to each of said deeds, and permitted both of them to be read in evidence to the jury, which was done. To which decisions and ruling, as to each of said deeds, the defendants excepted at the time the decisions and rulings were respectively made. The plaintiff then offered in evidence a deed from Eli B. Clemson and Ann M. Clemson, his wife, to John Shaw, dated the

20th day of October, A. D. 1829, for the said southeast quarter of section eighteen, above described. To the reading of which said deed in evi dence, the defendants then and there objected as being irrelevant and incompetent; but the court overruled the objection and permitted said deed to be read in evidence to the jury. To which ruling and decision the defendants did then and there except.

Said deed from Thomas Hart to Samuel F. Hunt was recorded June 28th, 1825; and said deed from said Samuel F. Hunt to said Elias B. Clemson, was recorded June 20th, A. D. 1825; but said deed from Eli B. Clemson and wife to John Shaw was never recorded. The
27 plaintiff then offered in evidence the following act of Congress, (to be found in volume 6 of United Statutes at Large, Private Laws, at page 366,) approved March 3, 1827, viz:

"AN ACT for the relief of the legal representatives of Giles Egerton.

"*Be it enacted, &c.*, That the legal representative or assignee of Giles Egerton, late a sergeant in Colton's Company of the Twenty-sixth Regiment of Infantry, be, and he or they is or are hereby, authorized to enter with the register of the proper land office, any unappropriated quarter section of land in the tract reserved for the satisfaction of military bounties in the State of Illinois, in lieu of the quarter patented to the said Giles, on the tenth day of January, one thousand eight hundred and eighteen, which had been previously patented to James Durney, and upon such entry a patent shall issue to such representative or assignee for the quarter section so selected. Approved March 3, 1827."

To the reading of which act in evidence, the defendants objected, when the same was so offered, as being irrrelevant and incompe-
28 tent; but the court overruled such objection and permitted said act to be read in evidence to the jury. To which decision and ruling the defendants did then and there except.

The plaintiff thereupon proved that John Shaw, on the 6th day of April, A. D. 1838, entered with the register of the land office at Quincy, Illinois, the N. W. ¼ 28, T. 5 N., R. 5 W. of the 4th P. M., in pursuance of the foregoing act of Congress. But the defendants, at the time such proof was offered, objected to the same; but the court overruled the objection and permitted such proof to go to the jury. To which decision and ruling the defendants did then and there except. And here plaintiff again rested.

And this was all the evidence offered or heard on behalf of either of the parties in the case.

The court thereupon gave to the jury, at the plaintiff's request, and against the objections of the defendants, the following instructions, viz: "The jury are instructed that the plaintiff has, by legal evidence, shown title in himself in fee-simple; and that the defendants have
29 not shown outstanding title in Giles Ederton, or any one claiming under him; and the plaintiff is therefore entitled to recover."

To the giving of which instruction to the jury, the defendants then and there excepted. And the defendants then asked the court to give to the jury the following instructions, viz:

"1. The jury are instructed that the defendants have proven that the land in controversy, (namely the N. E. ¼ sec. 18, township 4 north, range 2 east, in the Illinois military bounty tract,) was granted by the United States to Giles Egerton, on the 10th of January, 1818, and that said Giles Egerton, in July, 1819, granted and conveyed the same to Thomas Hart, which conveyances constitute an outstanding title that

defeats the plaintiff's right of recovery, and the verdict should be for the defendants.

"2. The jury are also instructed that the defendants have shown that, on the 10th day of January, A. D. 1818, the land warrant in favor of Giles Egerton was duly located on and upon the land in controversy, which location is not shown to have been vacated or set
30 aside; therefore said tract of land was not subject to entry by or grant to Edward F. Leonard, in 1868, and the finding should be not guilty."

But the court refused to give such instructions, or either of them, to the jury; to which refusal the said defendants did then and there except. The jury thereupon rendered a verdict of guilty, in favor of the plaintiff; to which the defendants then and there excepted. The defendants thereupon moved the court for a new trial, and assigned as reasons therefor, the following:

1st. The court admitted improper evidence on behalf of the plaintiff.

2nd. The court gave an improper instruction to the jury, at the instance of the plaintiff.

3rd. The court improperly refused to give to the jury the instructions asked by the defendants.

4th. The verdict of the jury is against the law and the evidence.

But the court overruled the said motion for a new trial and refused to grant the same; to which ruling and decision the defendants
31 did then and there except. And the court thereupon rendered judgment upon the verdict and that the plaintiff may have a writ of possession therefor, and for one cent damages, and also for costs of suit against the defendants; to all which said defendants did then and there except. And because these matters do not sufficiently appear of record, the defendants pray that this their bill of exceptions may be signed and sealed and made of record; which is accordingly done.

S. H. TREAT. [SEAL.]

(Indorsed:) Filed June 30th, 1871. J. A. Jones, cl'k.

Then, afterwards, to wit, on the sixth day of July, in the year last aforesaid, came again said defendants, by S. C. Judd, esq., their attorney, and filed in said clerk's office their bond herein; which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

32 CALVIN BRANSON AND NATHAN LINDSEY, plaintiffs in error, *vs.* JACOB WIRTH, DEFENDANT IN ERROR. } Ejectment. In error.

Know all men by these presents that we, Calvin Branson and Nathan Lindsey, principals, and S. Corning Judd, surety, are held and firmly bound unto the above-named Jacob Wirth, in the sum of one thousand dollars, to be paid to the said Jacob Wirth, his executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this thirtieth day of June, A. D. 1871.

Whereas the above-named Calvin Branson and Nathan Lindsey have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in a suit in ejectment in favor
33 of the above-named Jacob Wirth, as plaintiff, and against the said above-named Calvin Branson and Nathan Lindsey, as defendants, in and by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the said above-named Calvin Branson and Nathan Lindsey shall prosecute said writ of error to effect, and shall answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CALVIN BRANSON. [SEAL.]
NATHAN LINDSEY. [SEAL.]
S. CORNING JUDD. [SEAL.]

Sealed and delivered in presence of—
W'M J. DYCKES, *of Lewistown, Ills.*

(Indorsed:) Filed July 6th, 1871. J. A. Jones, clerk.

34 Circuit court of the United States for the southern district of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States in and for the said southern district of Illinois, do hereby certify the foregoing to be a true and complete transcript of the papers filed and proceedings thereon had in a certain cause wherein Jacob Wirth is plaintiff, and Calvin Branson and Nathan Lindsey are defendants, as truly and completely as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court, at Springfield, in said district, this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-sixth year.

[SEAL.] J. A. JONES, *Clerk.*

[5-c't int. rev. stamp, canceled.]

35 UNITED STATES OF AMERICA, *ss:*

To JACOB WIRTH, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein Calvin Branson and Nathan Lindsey are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois, and one of the judges of the circuit court of the United States for said district, this sixth day of July, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the ninety-sixth year.

S. H. TREAT,
District Judge.

36 (Indorsed:) Circuit court United States, southern district of Illinois. Jacob Wirth vs. Calvin Branson and Nathan Lindsey. Citation.

I hereby return this writ, and certify that I have duly executed the same by reading it to John A. McClernand and N. M. Broadwell, who are the attorneys of the within-named Jacob Wirth, this 25th day of September, A. D. 1871.

JOHN L. ROULT,
U. S. Marshal So. Dist. Ill.,
By JAMES E. HILL, *Deputy.*

Service, $4 00.

37 Supreme Court of the United States. December term, A. D. 1871.

CALVIN BRANSON AND NATHAN LINDSEY, pl'ffs in error,
vs.
JACOB WIRTH, DEF'T IN ERROR. } In error.

Error to the circuit court of the United States for the southern district of Illinois.

Appearance and assignment of errors.

And now come the said plaintiffs in error, Calvin Branson and Nathan Lindsey, by S. Corning Judd, their attorney, and enter their appearance in said proceeding by writ of error in the said Supreme Court of the United States, and say that, in the record and proceedings aforesaid, and also in the judgment aforesaid of the said circuit court of the United States for the southern district of Illinois, as in and by the same record, proceedings, and judgment foregoing doth appear, mani-
38 fest error hath intervened to the great damage of them, the said Calvin Branson and Nathan Lindsay. And for assignment of errors the said plaintiffs in error set forth and show the following, that is to say:

First. The court below erred in admitting to the jury improper evidence on behalf of the plaintiff below.

Second. The said circuit court erred in giving to the jury the instruction asked and given on behalf of the plaintiff below.

Third. The said circuit court erred in refusing to give to the jury the instructions asked by the defendants below.

Fourth. The court below erred in overruling the motion of the defendants below for a new trial.

Fifth. The court below erred in rendering judgment on the verdict of the jury.

Sixth. The record, proceedings, and judgment aforesaid are otherwise irregular, erroneous, informal, and insufficient, &c.

Wherefore the said plaintiffs in error pray that the record, proceedings, and judgment aforesaid may be reviewed, and the said judg-
39 ment reversed, annulled, and altogether for nothing held; and that they may have such other or further order of this honorable court upon and touching the same as by law they may be entitled to have in the premises, &c.

S. CORNING JUDD,
Of Lewistown, Ills., Attorney for Pl'ffs in Error.

(Indorsed:) Appearance and assignment of error.

(Indorsement on cover:) No. 567. Calvin Branson & Nathan Lindsey, plaintiffs in error, vs. Jacob Wirth. S. Illinois C. C. U. S. Filed 30th September, 1871.

Supreme Court of the United States,

DECEMBER TERM, A. D. 1872.

No. 113.

CALVIN BRANSON AND NATHAN LINDSEY,
Plaintiffs in Error,
vs.
JACOB WIRTH,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF FOR PLAINTIFFS IN ERROR.

BY S. CORNING JUDD.

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1872.

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Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF FOR PLAINTIFFS IN ERROR,

BY S. CORNING JUDD.

As my printed argument (intended for both brief and argument), forwarded to the Clerk before I was advised of the amendments to Rule 21st, adopted Nov, 16, does not technically comply with some of the requirements of the amended rule, I respectfully submit the following brief, begging the court to refer to the printed argument itself,

for the elucidation (and for what I hope the court will regard as demonstration), of the points thus presented.

I.

Statement of the Case.

This action was ejectment for the *north*-east 18, 4 N. 2 E, 4th P. M., Illinois.

Defendant in Error (plaintiff below), on the trial, recovered as the grantee of Edward F. Leonard, who obtained a patent for the land in controversy, Feb'y 20, 1868. (Record, folios 18, 19).

The defendants below (Plaintiffs in Error), proved that the land in dispute was appropriated by location upon the same, of military land-warrant No. 13,598, in favor of Giles Egerton, Jan'y 10, 1818, and also showed that the land was granted to said Egerton, described as "late a sergeant in Cotton's Co." &c., by patent of the same date of the location, and thus over 50 years the senior of Leonard's grant, and which senior patent refers to said land-warrant location as its basis. (Record, folios 19, 20, 21).

By reason of either the location of the warrant or the grant of the land, Plaintiffs in Error claimed, and still claim, that the land was not subject to entry or sale, and hence that the junior patent was and is *void*. Neither the location in favor of Egerton, nor the patent to him, have ever been canceled or vacated, nor has any attempt to that end been made by any department of the government.

But to establish the grant to Egerton, defendants below read in evidence an exemplification of the patent to him for said *north*-east 18, but did not offer or read a memorandum made on the margin of such exemplification (without

signature and without explanation, except as it explains itself), as follows:

"(Endorsed:) This patent was iss'd for the S E ¼, "instead of the N E ¼, *as recorded*; sent cert[illegible] "fact to E. B. Clemson, at Lebanon, Ill's. "of 19 May, 1826."

Under defendants' objection and exception permitted this memorandum to be read to the jury at the instance of plaintiff below (folio 22.) This was error.

GILES EGERTON deeded to THOMAS HART (deed recorded January, 1820,) describing "*south*-east" 18, &c., "which quarter section to said Giles," * * "as will appear by patent obtained from the General Government, dated the 10th day of January, A. D. 1818." To show that the specific description was a mistake, it was proven that the *south*-east quarter was patented to JAMES DURNEY, Jan'y 7, 1818 (Record, folios 22, 23.) Hence Plaintiffs in Error insist that the *north*-east quarter passed into HART, by the general description; though whether it did or not, does not materially affect our case, only to show who was the "legal grantee" of said EGERTON, with reference to a question arising under a private act of Congress that figured on the trial, and under which act a fancied estoppel, by matter *in pais*, misled the court below.

The defendants below also proved that they and their grantors had been in the undisturbed possession of the whole of said *north*-east quarter for over 25 years before this suit was brought, and paid all taxes and assessments thereon for all that time under a judgment and deed for the taxes for 1839. (Record, folios 23, 24). And they claim that thereby they are shown not to be mere intruders upon the land in controversy; and the title not having been in the Government during that time, they also claim under

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GILES EGERTON deeded to THOMAS HART, July 29, 1819, (deed recorded January, 1820,) describing the land as the "*south*-east" 18, &c., "which quarter section was granted to said Giles," * * "as will appear by patent obtained from the General Government, dated the 10th day of January, A. D. 1818." To show that the specific description was a mistake, it was proven that the *south*-east quarter was patented to JAMES DURNEY, Jan'y 7, 1818 (Record, folios 22, 23.) Hence Plaintiffs in Error insist that the *north*-east quarter passed into HART, by the general description; though whether it did or not, does not materially affect our case, only to show who was the "legal grantee" of said EGERTON, with reference to a question arising under a private act of Congress that figured on the trial, and under which act a fancied estoppel, by matter *in pais*, misled the court below.

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he limitation laws of Illinois, a right to the land practically equivalent to title in fee.

The plaintiff, under defendants' objections and exceptions for incompetency and irrelevancy, was then permitted to prove that THOMAS HART, in 1824, conveyed the *south*-east 18 to SAM'L F. HUNT, and that HUNT conveyed the same quarter to ELI B. CLEMSON in 1825, and that CLEMSON conveyed the same to JOHN SHAW in 1829. The deed last referred to was never recorded, but the others were. (Record, folios 25, 26.)

Under defendants' like objection and exception for irrelevancy and incompetency, Plaintiff below was also allowed to read in evidence to the jury a private act of Congress, of March 3, 1827, authorizing the "*legal* assignee" of GILES EDGERTON, "late a sergeant in Cotton's Co." etc., to enter another tract "in lieu of the quarter patented to "the said Giles, * * Jan'y 10, 1818, *which had been previously patented to James Durney*," etc.; and also, to prove that said SHAW entered another tract in pursuance of said act. (Record, folios 27, 28.)

[By reason of the marginal memorandum quoted, and of the aforesaid conveyances of the *south*-east quarter of section 18, and of the act of Congress, and SHAW's entry of a tract under the same, the court below held that an estoppel *in pais* was created, which overturned the defense. There was no evidence connecting the defendants below with either patent title, except that they sought to protect their possession of the land in controversy, by setting up an outstanding title through the senior patent. Even if there was an estoppel as to the *holder* of that *title*, (which there was not,) it nevertheless remains to be explained *how* any such estoppel theory put the *title* of the *north*-east quarter in controversy back into the United States, and rendered the land subject to entry and sale, so as to give any force to the LEONARD patent of 1868. If the *title* was not re-in-

vested in the United States, then the land was subject to the taxation through which the defendants below acquired their rights. No estoppel by matter *in pais*, such as urged, could divest the State of Illinois of the right of taxation, so long as the land-warrant location, and the *legal* title remained as it did].

This was all the evidence, and the court then instructed the jury on behalf of plaintiff, under defendants' objections and exceptions, as follows:

"The jury are instructed that the plaintiff has, by legal evidence, shown title in himself, in fee simple, and that the defendants have not shown outstanding title in Giles Egerton, or any one claiming under him; and the plaintiff is, therefore, entitled to recover." (Record, folios 28, 29.)

And the court refused to give the following instructions asked by defendants below, and exceptions were entered:

"1. The jury are instructed that the defendants have proven that the land in controversy, (namely, the NE. ¼ sec. 18, township 4 north, range 2 east, in the Illinois military bounty tract,) was granted by the United States to Giles Egerton, on the 10th of January, 1818, and that said Giles Egerton, in July, 1819, granted and conveyed the same to Thomas Hart, which conveyances constitute an outstanding title that defeats the plaintiff's right of recovery, and the verdict should be for the defendants."

"2. The jury are also instructed that the defendants have shown that, on the 10th day of January, A.D. 1818, the land warrant in favor of Giles Egerton was duly located on and upon the land in controversy, which location is not shown to have been vacated or set aside; therefore said tract of land was not subject to entry by or grant to Edward F. Leonard, in 1868, and the finding should be not guilty." (Record, folios 29, 30.

The jury found for plaintiff, and a motion for a new trial on account of improper evidence admitted, and an improper instruction given for plaintiff, and on account of

the refusal of proper instructions asked by defendants, and because the verdict was against the law and the evidence, was overruled, and exceptions taken. Judgment was then rendered, and exception entered. (Record, folios 30, 31.)

It will be noted, that there was no conveyance of either the north-east or south-east 18, back into the United States; also that there is no pretense that HART ever attempted to convey the *north*-east quarter, either by specific or general description: hence that he was the only "*legal* assignee" of EGERTON. It will likewise be noticed that there is no evidence that a "patent" or supposed copy of a grant was ever "issued" to EGERTON for the *south*-east quarter, either by mistake for the *north*-east or otherwise, unless the solemn record of the Government is to be treated as a farce and the marginal memorandum as a verity. The act of Congress proves nothing in this regard. Congress cannot legislate *facts* into being. Recitals of supposed facts in an act are not evidence of the existence of any such facts. But if the recitals be taken as true, they only show that the quarter "which had been previously patented to James Durney," (proven to be the *south*-east 18,) was patented on the 10th Jan'y, 1818, to *some* man of *the name* of "GILES EGERTON, late a sergeant in Cotton's Company," &c. The courts cannot *presume* that this was the *same* GILES EGERTON to whom the *north*-east quarter was patented, in the absence of proof that there was *but one* sergeant of that name in Cotton's Company. This is expressly held in Montag *v.* Linn, 23 Ill., 556-7, 559-60. The quarter section "which had been previously patented to James Durney," then, is not shown to have been patented at any time to *the* EGERTON to whom the *north*-east was granted, even if the recitals of the act are to be taken as true, (which they cannot be.) On the contrary

the court *will* presume, as the evidence stands, that *the* EGERTON referred to in said act is *another* EGERTON than the one to whom the *north*-east was granted.

But even if the marginal memorandum referred to and the recitals of the act of Congress are to be taken as true, and even if *the* EGERTON of the senior patent is regarded as the *same* EGERTON referred to in the act, and moreover, even if said act can, by forced construction, be considered as having *intended* reference to the *north*-east quarter, and even if HART *intended* to convey said *north*-east quarter (instead of "the *south*-east" described in his deed, and also in the other deeds down into SHAW;) yet, nevertheless, the *utmost* that the proof can thereby be construed to show, is that an *equitable* title to the *north*-east quarter passed into SHAW, so that SHAW, by reason of the matter *in pais*, (if he can be said to have entered other land under the act of Congress "in lieu" of said *north*-east quarter,) might *in Equity* be estopped from claiming such *north*-east quarter, as against the United States or its subsequent grantees. And the utmost hair-splitting tension of this supposed proof can do no more, in its construction, than to show that an imaginary *equitable* title to said *north*-east quarter was put back into the Government, at the date when SHAW availed himself of the act of Congress.

It should be particularly noticed, also, that THOMAS HART, (who, under any possible construction of the evidence, was the only "*legal* assignee" of said GILES EGERTON,) never availed himself of the act of Congress.

II.

ASSIGNMENT OF ERRORS.

Upon the case thus stated the following errors are relied upon:

1*st*. The court below erred in admitting as evidence to

the jury, at the instance of the plaintiff below, the memorandum endorsed on the margin of the exemplificafion of the patent, heretofore quoted.

2*nd*. The court below erred in admitting in evidence, on behalf of plaintiff below, the deeds from HART to HUNT, and from HUNT to CLEMSON, and from CLEMSON to SHAW, and each thereof, for the *south*-east quarter of section 18, etc.

3*rd*. The court below erroneously permitted the plaintiff below to read in evidence the said Private Act of Congress, the substance of which is quoted on a former page hereof.

4*th*. The circuit court erred in allowing proof to go to the jury that JOHN SHAW entered another tract of land in pursuance of said Act of Congress.

5*th*. Said circuit court erred in giving to the jury the instruction on behalf of plaintiff below, hereinbefore quoted.

6*th*. The court below erred in refusing to give to the jury the two instructions asked by the defendants below, and quoted herein in full.

7*th*. The court below erred in overruling the motion of defendants below for a new trial, and in rendering judgment upon the verdict of the jury.

III.

BRIEF OF THE ARGUMENT.

I. Land patents must be recorded. 1 Brightly's Dig., 465, clause 28.

II. Exemplifications of patents are of equal validity with the original copy of the grant delivered. 1 Brightly, 463, cl. 9; *Id.*, 461, cl. 26; *Id.* 465, cl. 27; 21 How., 175; 5 Peters, 239; 1 Black, 554–5.

III. Even if there was a mistake in the supposed copy of the grant "issued" to EGERTON, so that it described the *south*-east instead of the *north*-east 18, yet the grant,

nevertheless, was for the *north*-east. The so-called "patent" (i. e. the copy delivered to patentee,) is not the *grant*—only *evidence* of it. There was no *record* of any such grant.

1. A patent "*is not deemed a grant until the proper record is made.*" United States *v.* Vallejo, 1 Black, 555.

All mistakes made in or "*doubts arising upon the copies that may be delivered are resolved by reference to the protocol* from which the copies are taken, and *without which they have no authority.*" 1 Black, 555. See also 1 Black, 298, and *Id.*, 251; 24 How., 347–9; 23 *Id.*, 273; and 21 *Id.*, 175.

Decisions made by this court based upon the laws of Mexico as to recording patents are in point, for their rules in this regard are substantially the same as ours. See Mexican regulations as to such records in 1 Black, 550, 552.

[In the case last cited this court held that a false note, at the bottom of the grant, by the officiating secretary, could not affect the grant. *Ergo*, why or how can a memorandum on the margin of an exemplification?]

A naked grant of land by government officers is *void.* 1 Black, 550; *Ibid*, 298. etc.; 24 How., 246.

2. A patent is the "*record* of the Government of the *existence and validity* of the grant. Teschemacher *v.* Thompson, 18 Cal., 26; Beard *v.* Federy, 3 Wallace, 492–3.

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3. "The patent is *but evidence of a grant.*"—U. S. *v.* Stone, 2 Wallace, 535; 18 Cal., 27; 1 Cranch, 162.

4. And the *record* is the *highest* evidence. U. S. *v.* Castro, 24 How., 350.

IV. "No officer of the Land Office is competent to cancel or annul the acts of his predecessor. This is a *judicial* act and requires the judgment of a court." United States *v.* Stone, 2 Wallace, 535.

* 5. A patent takes effect at its execution no matter whether delivered or not. — Hulick v Scovill, 4 Gilm., 173-4, Marbury v. Madison, 1 Cranch 156, 166, 167.

A patent, except when issued without authority, can be *impeached or avoided* if at all, *only* by a bill in equity or *scire facias* instituted *directly for that purpose*, in a Federal Court; *not in an action at law* or any *collateral* action. 13 Peters, 436; 3 Peters, 340, 341; 11 Wheat., 381-4; 9 Cranch, 98-9; 18 How., 87; 6 Cowan, 281; 5 Denio, 389, 398; and many other cases cited at pages 13 and 14 of my printed argument.

V. It follows that neither the memorandum on margin of exemplification, nor the act of Congress, nor any matter *in pais*, can have any effect, in any event, to "impeach or avoid" the senior patent in this collateral action at law, if at all.

This involves the errors of the court below in admitting improper evidence to the jury (as already indicated,) which tended to "impeach and avoid," and which the court below treated as "avoiding" both the senior patent and the land warrant location. That the evidence referred to was improper will appear from an after part of this Brief.

VI. That the *north*-east quarter in controversy *was* granted to EGERTON is not questioned. If there is any proof that the *south*-east was patented to a man of the same name, (which there is not,) then, there being no proof that there was *but one* GILES EGERTON, "late a sergeant in Cotton's Company," etc., the law will *not presume* that there were not two sergeants of that name in the same Company. This is a matter of proof, and the plaintiff fails if he does not make out his case. Montag *v.* Linn, 23 Ill., 556-7, 559-60.

The above case is stated and the opinion of the court as to the point indicated, quoted at pages 15 and 16 of the printed Argument for Plaintiffs in Error.

VII. EGERTON'S deed to HART, of 1819, conveyed to

the latter the *legal* title to the *north*-east quarter in controversy, by means of the general description involved in the reference to EGERTON'S patent of Jan'y. 10, 1818. The land-warrant location and the patent showed affirmatively that EGERTON did in fact have title to the *north*-east; while the patent to DURNEY of prior date (of January 10, 1818,) for the *south*-east quarter offered by defendants below, showed that said EGERTON did *not* have title to the latter tract, also described in the deed to HART.

If there be two descriptions in a deed, one of which is proven to cover the proper tract, the mis-description will be rejected as surplusage; and effect will be given to the proper description, even at law. 5 N. H. 408; 4 Mass., 196; 33 Maine, 204; 6 Cowen, 281; 24 Ill., 67, 74; 18 Ill., 206; and several other cases cited at pp. 18, 19, of my Argument.

[If it be said that, by this law, I prove that the act of Congress authorized the entry of a tract "in lieu" of the *north*-east, (as a patent of Jan'y 10, 1818, to somebody of the *name* of EGERTON, is referred to, as well as the land "which had been previously patented to James Durney,") I answer that this does not follow, because the *north*-east quarter had *not* been "previously patented to James Durney," and because there is no evidence that the "patent" or supposed copy of the grant that was "issued" to EGERTON was by a mistake for the *south*-east instead of the *north*-east quarter, and also because, if there was any patent issued for the south-east quarter to a man of the name of GILES EGERTON, then there is no proof that there was not another GILES EGERTON than the one to whom the north-east quarter was patented, and to which Egerton such patent was "issued" for said south-east quarter.]

VIII. If the effect claimed for it be given to the deed from EGERTON to HART, then an outstanding legal title was established, on the trial, as resting in HART, and the

latter is shown to be the "legal assignee" of EGERTON as to said *north*-east quarter. If the effect claimed be not given to EGERTON's deed, then the outstanding title rested in EGERTON.

THE LOCATION OF THE LAND WARRANT AND ITS EFFECT.

I. (1.) By the land warant location EGERTON acquired an absolute right to the land. See Acts of May 6, 1812, 2 Stat. at Large, 729, §2, 3; Act Dec. 24, 1811, *Ibid*, 669, §2; Act Jan'y 11, 1812, *Ib.*, 672, §12.

(2.) Illinois military tract set apart. Act May 6, 1812, above referred to, 728, §1, &c.

(3.) As to effect of land-warrant location and the rights thereunder acquired, see 22 Cal., 48; 31 *Ib.*, 264; 1 Smith, (Ind.,) 211; 18 Cal., 27; 6 Wallace, 402, 410, 413, 417–18; 2 How., 344; 10 How., 372; Viner's Abr. (title Relation,) 290.

(4.) The rule indicated is available even to strangers—10 How., 372–3; 3 Wallace, 491.

(5.) The right of EGERTON to the land in controversy, under the location, even without patent, was liable to execution. R. S. Ill., 1845, 300, 301, §1, 3; 10 How., 348, 372, &c.

(5.) *Where the Land Office cancels an entry of land and issues a patent to another person for the land, the patent and cancellation are both void.* 1 Black, 132; 10 How., 88.

See also 1 Carter, 339; 23 Miss. (1 Cush.,) 383; 7 Texas, 259.

(6.) Where government land has been *entered or located*, "the Government can no more dispose of the land to another person than if the patent had been issued." 3 McLean, 107, 109.

II. The patent and location of the warrant are to be taken together and operate "as one act," making the legal

title complete, under the doctrine of Relation. The location is evidence "in aid of a patent;" 13 Peters, 450, 451; 10 How., 372–3; 12 Mo., 145; Viner's Abr. (Relation) 290; 3 Wallace, 491, 18 Cal., 27.

III. (1.) *Last of two patents void.* Either former land warrant location or patent *conclusive* on Government and all claimants, even at law. 6 Wallaee, 160; 1 *Idem*, 115; 2 *Id.*, 535–7; 2 How., 317–18; *Idem*, 581; 13 Peters, 498; *Ibid*, 449; 11 Wheat, 380; 6 Peters 328; 3 Wallace, 478, 492; 12 Peters, 435; 4 *Ibid*, 511; 15 Cal., 361; *Id.*, 533; 18 *Id.*, 11, 25; 19 How., 79; 11 Mo., 585; 9 Cranch, 99; and many other cases cited at pp. 23–6 of my printed Argument.

(2.) As to re-investing the United States with the *title* of the land in controversy, so as to render it subject to entry and sale, by means of the blunder of a clerk and the act of Congress, &c., see printed Argument, pp. 26–8, clauses 11 and 12, and authorities cited.

THE MARGINAL MEMORANDUM AND THE ACT OF CONGRESS, ETC.

I. (1.) There is nothing in the record to show that the marginal memorandum on the exemplification was on the record in the Land Office, the exemplification being of the *patent* only, and not of any memorandum; but, if it be conceded that the memorandum was copied from the record, then I say that no certificate thereof could make it evidence. The law authorizes no such memorandums to mutilate the records; and an exemplification can be evidence only when the law authorizes the record, or expressly makes the copy evidence. 5 McLean, 111.

(2.) Where the Com'r of the Gen'l Land Office *gave a certified copy of a grant, and annexed what purported to be a release by the grantee back to the Government*, of the genuineness of which there was no proof, it was *held that the party offering the grant in evidence was not bound to read such release.* 11 Texas, 98.

(3.) A certificate as to the substance or effect of a record is not evidence. 2 Jones' (N. C.) L. R., 368.

(4.) A register in certifying a copy of a deed, *stated that the words "not sealed" were entered on the record opposite the names of the signers: held, not legal evidence, as the register had no authority for entering statements of fact not in the original.* 14 Mich., 361, 371.

(5.) Indorsements on the back of written instruments, *even of payments*, are not evidence, without further proof of same: 7 Minn., 368; 17 John., 182; 2 Vt., 142; 16 Vt., 13; 2 Mass., 397; and other cases referred to at pp. 29, 30, printed Argument.

(6.) The *testimony* of Government officers cannot be received to *supply or contradict* the public records. 1 Black, 298; 24 How., 346, etc., and 348, etc

If not the "testimony," why a mere memorandum that may have been clandestinely made by an interested party, and, at all events the authorship of which nowhere appears?

(7.) *A patent "cannot be contradicted or explained by parol."* 2 How., 318.

For other references to establish the point under consideration, see printed Argument, pp. 29, 30.

II. (1.) It was error to admit in evidence the private Act of Congress. So far as a legislative act "recites facts, it is not a law." "*The Legislature has no power to legislate the truth of facts.*" 7 Geo., 92–3; 10 Eng. L. & E. R., 287, 294.

Beyond the recitals of supposed facts, the Act amounts to nothing whatever, except to show that EGERTON'S "legal assignee" was authorized, for *some* reason, to enter a tract of land; and for that purpose alone it could cut no figure in this case, and hence was irrelevant.

(2.) Congress has no power to nullify titles once granted or confirmed by authorized officers. 6 Wallace, 160, 165–6.

(3.) When land is once appropriated to any purpose, *no subsequent law*, or proclamation, *or sale*, will be construed to embrace or operate upon it. 13 Peters, 449.

For futher authorities, under this heading, and for quotations from authorities, I refer to my printed Argument, pp. 31, 32.

III. The deeds for the *south*-east 18, ending the chain in SHAW, and the proof showing that SHAW entered a tract of land under the act of Congress, were all irrelevant, for reasons that have sufficiently appeared.

THE DOCTRINE OF ESTOPPEL.

As the court below, according to my understanding of the law, misconceived this doctrine, as having any bearing upon the facts of this case, and thereby was led to direct a verdict for the plaintiff below, I beg the particular attention of this court to the discussion of the matter in my printed Argument, at page 32, *et sequitur*.

I. Defendant in Error has no privity with EGERTON or HART, nor has he, through the junior patent or otherwise, been connected with even any *equities* as to the land in controversy, as is shown at pages 34 and 35 of the printed Argument for Plaintiffs in Error. And there is no pretense of any estoppel in this case, unless there be one in *equity*.

(1.) "A stranger can not be bound by, nor take advantage of an estoppel." 3 Metc., 40; 5 Wallace, 795; 22 Mo., 419; 25 Texas (Walker), 4; 9 Wallace, 313; and other cases cited at pages 35 and 36, Argument, especially 10 N. H., 153.

(2.) An equitable estoppel never takes place, unless the party seeking to avail himself of it has been actually misled. The doctrine of estoppel is highly equitable in its nature. 10 N. Y. (6 Seld.), 402, 406–7; 36 Penn., 519.

"*It is essential to an equitable estoppel, by matter in pais, that he who sets it up should show that he has been misled to his hurt.*" 36 Penn., 519, 522, and cases cited.

For further authorities to this end, and for quotations from other cases, I refer to page 37, Argument; and to show that Defendant in Error nor his grantor has been misled, I beg to refer to pages 34 to 41, inclusive, of said Argument.

Plaintiffs in Error had been personally in full possession of the land in controversy, under a tax title, for more than 20 years when this suit was brought, and they and their grantors had been so in possession for more than 25 years, and paid all taxes and assessments on the land. (Record, folios 23–25.)

When a party purchases land in possession of a third person, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights of the possessor, and he can not set up the want of notice to protect himself. Brewer *v.* Brewer *et al.*, 19 Ala., 481.

If Defendant in Error or his grantor had inquired into the rights of the parties in possession, this lawsuit would not have been pending—certainly not unless the man LEONARD, instead of being "misled," was stealthily contriving, through technicalities and flaws, monstrously *inequitable*, to grasp a very valuable tract of land by paying the Government a nominal price, and thus deprive the hard-working settlers of their possessions of over 25 years.

There being no possible theory on which Defendant in Error or his grantor (LEONARD) could have been "misled to his hurt," and the doctrine of estoppel being highly *equitable* in its nature (10 N. Y., 407), there is not the shadow of basis for application of the doctrine in the case at bar.

II. ESTOPPEL IN EQUITY.—As has been seen, the *utmost* that can be *claimed* is an estoppel *in Equity*, and even that only by the aid of matter *in pais*.

(1.) "There is no rule of practice better settled than that an equitable title forms no bar to a recovery in ejectment." 31 Ill., 468; 35 Mo., 70.

(2.) The *legal title* to land must always prevail in an action of ejectment, and *such title cannot pass* by fraudulent representations, nor *by acts or conduct in pais*, without deed. Smith *v.* Munday, 18 Ala., 185.

(3.) *When circumstances dehors the grant are relied upon to avoid a patent, the grant is voidable only by direct suit for the purpose.* Jackson *v.* Hart, 12 Johns., 77.

(4.) *Estoppels in pais*, relating to real etsate, *cannot be made available in a court of law.* Flake *v.* Fash. 44 Ill., 302, 305.

(5.) *An estoppel* IN EQUITY *cannot be asserted in a trial* AT LAW. Bishop *v.* Blair, 36 Ala., 80, 86; Miller *v.* Graves, 38 Ill., 466, and cases cited.

(6.) If one, having the *legal title* to land, *induces another to purchase it under execution against him, he is not thereby estopped* in a *court of law*, from showing that the sale was *void*, and passed nothing to the purchaser. Smith *v.* Munday, 18 Ala., 182; McPherson *v.* Walters, 16 Ala., 714.

From the last above proposition of law, it follows that even if the act of Congress can be construed as having any reference to the *north*-east quarter, in controversy, and even if EGERTON or HART, whichever had the legal title, had induced LEONARD to enter that quarter and procure his junior patent, and had been made defendant in this case below, instead of the Plaintiffs in Error, *even he* would not have been estopped *at law* from showing that the junior patent was *void*.

III. No estoppel, if it existed as to anybody, could vacate the land-warrant location or cancel the patent to

EGERTON; nor could it in any way re-invest the title in the Government, so as to render the land not liable to taxation.

THE TAX-TITLE AND POSSESSION, &C., THEREUNDER.

The land having been liable to taxation, and Plaintiffs in Error, having acquired a tax-title under which they and their grantors occupied and paid taxes, &c., for over 25 years before this ejectment suit was brought, though not having proven themselves connected with the patent title, yet are shown not to be interlopers or intruders, but to have substantial rights in the land.

(1.) The land was liable to taxation as soon as the military land-warrant was located, even if such location created only an inchoate title.

"No principle is better settled in this country than that an inchoate title to lands is property." Delassus *v.* U. S., 9 Peters, 133.

Lands entered or located are liable to be taxed as well before patent issued by the United States as after. Astrom *v.* Hammond, 3 McLean, 107-9.

And so such lands are also "subject to seizure and sale by execution." Landes *v.* Brant, 10 How., 372, 373.

"All property, real and personal," with certain exceptions, is liable to taxation in Illinois, and was in 1839. R. S. Ill., 1845, 436, § 1.

(2.) To show that Plaintiffs in Error had acquired substantial rights under the laws of Illinois, I quote two sections of the limitation laws and refer to some decisions thereunder. Section 1 of the Act of March 2, 1839, (Laws of Illinois, 1839, p. 266), provides as follows:

"Every person in the actual possession of lands or

tenements, under claim and color of title, made in good faith, and who shall for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise, or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section."

The same provision was re-enacted in the revision of 1845. R. S. 1845, of Ill., 104, § 8.

Another statute, in force at a still earlier day, reads as follows:

"Every real, possessory, ancestral, or mixed action, or writ of right, brought for the recovery of any lands, tenements or hereditaments, shall be brought within twenty years next after the right or title thereto, or cause of such action accrued, and not after." R. S. 1845, Ill., § 7.

"Claim and color of title," under the section first quoted, may be a claim of title less than color. 26 Ill., 520; 17 Ill., 501; 14 Ill., 159. "Any instrument indicating an intention to pass a title to the lands" described therein gives "color of title" under another section of the limitation laws of Illinois. 34 Ill., 478.

An unsupported tax deed is "claim and color of title," and payment of taxes and possession thereunder, for seven years, creates a bar under the section first quoted. Webster *et al v.* Webster, 55 Ill., 325.

And the limitation will run in favor of a party having "claim and color of title," although he may have actual notice of an adverse claim, by record or otherwise. Cook *v.* Norton, 43 Ill., 391.

A complete bar was also established under the twenty

years' statute quoted, as well as under the common law limitation rule of that period. See Davies *v.* Easley, 13 Ill., 192; Turney *v.* Chamberlain, 15 Ill., 273; Clark *v.* Lyon, 45 Ill., 388.

That all this protection afforded by the laws of Illinois and that the land-warrant location and the senior patent can be overwhelmed by the fancied estoppel *in pais* set up in this case, with which my clients are not connected, and for which they are in no way responsible, is a proposition so startling, and so inconsistent with justice, that I shall rest in the confident expectation that the judgment below will not be permitted to stand.

S. C. JUDD,

Atty. for Pltffs. in Error.

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Supreme Court of the United States.

DECEMBER TERM, A.D. 1872.

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vs.
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Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Illinois.

ARGUMENT FOR PLAINTIFFS IN ERROR,

By S. Corning Judd.

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THE FACTS.

May it Please the Court:

This was an action of ejectment brought June 11, 1869, in the Circuit Court for the Southern District of Illinois, by Jacob Wirth, as plaintiff, against Calvin Branson and Nathan Lindsey, defendants, for the N. E. 18, 4 N. 2 E.

4th p. m., in Illinois. The declaration claimed title in fee in the plaintiff. The defendants pleaded the general issue. At the June term, 1871, of said court, a trial was had before the court and a jury, which resulted in a verdict and judgment for the plaintiff.

1. On the trial the plaintiff offered and read in evidence to the jury a patent from the United States to EDWARD F. LEONARD, for said quarter section of land, which recited the location of the land as being "in the district of lands subject to sale at Springfield, Illinois:" and which patent was dated Feb. 20, 1868. The plaintiff then read in evidence a deed for the same tract from said LEONARD to himself, bearing date April 24, 1869, and thereupon rested his case.

2. The defendants below then offered and read in evidence a duly exemplified copy of a land warrant, No. 13,598, and of a memorandum and endorsement thereon, exemplified and authenticated by the Commissioner of the General Land Office, June 1st, 1870; and which warrant, (dated Dec. 3rd, 1817), and memorandum and endorsement thereon (copied at folios 19 and 20 of the record), together with an exemplification of records of said General Land Office, show that, in pursuance of acts of Congress recited, GILES EGERTON, then late a sergeant in Capt. COTTON'S Co. of 26th Reg. U. S. Infantry, was entitled to 160 acres of land, to be located on the public domain appropriated for the grantees of such military warrants, and that said warrant, No. 13,598, was located according to law. Jan. 10, 1818, in favor of said GILES EGERTON, on the said *north*-east qr. 18, 4 N. 2 E. etc. in the Illinois military bounty tract. (Record, folios 19, 21.)

3. Said defendants below then offered and read in evidence an exemplified copy (from the record of the "Illinois military bounty land patents" in the General Land Office, at Washington), of a patent from the United

States to said GILES EGERTON, dated January 10th, 1818, granting to said EGERTON the said *north*-east quarter of sec. 18, 4 N. 2 E., &c. The said patent recites "That, in pur- "suance of acts of Congress, appropriating and granting "land to the late Army of the United States, passed on "and since the sixth day of May, 1812, GILES EGERTON "having deposited in the General Land Office, a warrant "in his favor, numbered 13,598, there is granted unto "the said GILES EGERTON, late a sergeant in COTTON'S "Co. of the 26th Regt. of Infantry, a certain tract "of land, containing one hundred and sixty acres, "being the *north*-east quarter of section eighteen," &c., as above described. (Record, folio 21).

4. On the margin of the said exemplified copy of said patent is a memorandum, copied as follows: "(En- "dorsed.) This patent was issued for the S. E. ¼, instead "of the N. E. ¼, as recorded; sent certificate of that fact "to E. B. Clemson, at Lebanon, Ill. See his letter of 19th "May, 1826." The word "endorsed" in said memorandum, is in black ink, and the rest of the memorandum is in red ink.

The defendants did not offer nor read said memorandum in evidence, but the court, at the instance of the plaintiff below, and against defendant's objections, permitted the same to be read in evidence to the jury by the plaintiff, and the defendants excepted. (Record, folio 22.)

5. The defendants then offered and read, in evidence, a deed, dated July 29, 1819, from GILES EGERTON to THOMAS HART, duly recorded in the recorder's office of the county in which the land was situated, on the 3d Jany., 1820, and which deed grants to said HART, from and by said EGERTON, real estate by the following description, viz.: "The *south*-east quarter of section eighteen, of "township four north, range two east, in the tract appro- "priated by the acts of Congress to the late Army of the

"United States, in the State (once the territory) of Illinois, "*which quarter section was granted to the said* GILES *in con-* "*sideration of his military services, as will appear by a patent* "*obtained from the General Government, dated the 10th day of* "*January, A. D.* 1818." (Record, folios 22, 23).

6. The defendants then offered and read in evidence, an exemplified copy of a patent from the United States to JAMES DURNEY, dated *January* 7, 1818, granting to said "JAMES DURNEY, late a private in Oglevie's Company of the "13th Regt. of Infantry, the *south*-east quarter of eighteen, "of township four north, in range two east, in the tract "appropriated (by the acts aforesaid) for military boun- "ties in the territory of Illinois." *Said patent refers to the deposit, &c., of a land warrant No.* 5,144, *&c., as the basis of the grant.* (Record, folio 23).

7. The defendants thereupon read in evidence a deed from the sheriff of Fulton county, Ill., (in which the land is located,) to TIMOTHY GRIDLEY, dated Nov. 14, 1843 (recorded Sept. 30, 1845), for the said *north*-east 18, 4 N. 2 E., for the taxes, &c., for 1839, under a judgment for same at the June term, 1840, of the said Circuit Court of said Fulton county, Ill. And said defendants also read in evidence several *mesne* conveyances from said GRIDLEY to themselves, inclusive, for said *north*-east q'r 18, by which whatever right or title said Gridley acquired under said sheriff's deed was regularly conveyed to them; the deed to the defendants of such title bearing date in February, 1849. And the defendants also proved that they and their grantors had occupied, cultivated, and had full and undisturbed possession of the whole of said quarter section ever since Nov., 1843, the whole thereof being under fence and cultivation; and that for the years 1844 to 1868, inclusive, they and their grantors paid all the taxes and assessments levied or assessed on or against said land, they and their grantors paying, respectively,

when they respectively owned and held said land under such title. And then the defendants rested. (Record, folios 23–25.)

8. The plaintiff then offered in evidence certified copies of deeds as follows: one from THOMAS HART to SAM'L F. HUNT, dated May 12, 1824, and recorded June 28, 1825; and one from SAM'L F. HUNT to ELI B. CLEMSON, dated April 7, 1825, recorded June 20, 1825; each for the *south*-east quarter of section eighteen, 4 N. 2 E., in the military bounty tract of Illinois. To the reading in evidence of each or either of said deeds the defendants objected at the time such deeds were respectively offered, as being irrelevant and incompetent, and as affording no proof bearing on the matter in controversy; but the court overruled such objection as to each of said deeds, and permitted both thereof to be read in evidence to the jury; which was done; and the defendants excepted. The plaintiff then offered in evidence a deed from ELI B. CLEMSON and wife to JOHN SHAW, dated Oct. 20, 1829, for the said *south*-east 18; and the court, against defendants' objections for irrelevancy and incompetency, permitted the same to be read in evidence; and the defendants excepted. The last-mentioned deed (from CLEMSON and wife to SHAW) was never recorded. (Record, folios 25, 26.)

9. Plaintiff then, by permission of the court (against defendants' objections for irrelevancy and incompetency, and under exceptions taken), read in evidence from 6 Stat. at Large (Private Laws), 366, an act of Congress, entitled "An act for the relief of the legal representatives of GILES EGERTON," approved March 3, 1827, authorizing "the *legal* representative or *assignee* of GILES EGERTON, late a sergeant in Cotton's Company," 26th Reg't Infantry, to enter any unappropriated quarter section of land in the Illinois military bounty tract, "in lieu of the quarter patented to said GILES 10th Jan'y, 1818, *which*

had been previously patented to James Durney ;" also authorizing a patent to issue for the land upon such entry. (Record, folio 27.)

And under like objection and exception by defendants, the plaintiff, by permission of the court, proved that JOHN SHAW, April 6, 1838, entered with the Register of the land office at Quincy, Ill., the N. W. 28, 5 N. 5 W. 4th P. M., in pursuance of said act of Congress.

And this was all the evidence offered in the case. (Record, folio 28.)

At plaintiff's request, and against defendants' objection and exception, the court thereupon instructed the jury as follows:

"The jury are instructed that the plaintiff has, by legal evidence, shown title in himself in fee simple; and that the defendants have not shown outstanding title in GILES EGERTON, or any one claiming under him; and the plaintiff is therefore entitled to recover."—(Record, folios 28, 29.)

And the court refused to give to the jury either of the following instructions, asked by the defendants, and exceptions were duly taken:

"1. The jury are instructed that the defendants have proven that the land in controversy, (namely the N. E. $\frac{1}{4}$ sec. 18, township 4 north, range 2 east, in the Illinois military bounty tract,) was granted by the United States to GILES EGERTON, on the 10th of January, 1818, and that said GILES EGERTON, in July, 1819, granted and conveyed the same to THOMAS HART, which conveyances constitute an outstanding title that defeats the plaintiff's right of recovery; and the verdict should be for the defendants."

"2. The jury are also instructed, that the defendants have shown that, on the 10th day of January, A.D. 1818, the land warrant in favor of GILES EGERTON was duly located on and upon the land in controversy, which location is not shown to have been vacated or set aside; therefore said tract of land was not subject to entry by or

grant to EDWARD F. LEONARD, in 1868, and the finding should be not guilty." (Record, folios 29, 30.

The jury rendered a verdict of guilty: and the court refused to grant a new trial, but rendered judgment for plaintiff below on the verdict: to all which the defendants took exceptions. (Record, folio 30.)

☞ From what precedes, the salient facts may be summarized thus:—1*st*. The plaintiff below claimed and recovered under a patent (Feb'y 20, 1868,) *fifty* years the junior of that, (~~Feb'y~~ 10, 1818,) for the same quarter section, set up by the defendants below as showing an outstanding title. 2*nd*.—The ~~junior~~ patent has never been vacated or set aside by any department of the government; nor has it in any way been impeached or even questioned, unless the *memorandum* endorsed on the margin of the record by *somebody* (nobody knows by whom) shall be construed as an impeachment; and which memorandum is not competent evidence. 3*rd*.—The act of Congress authorizing an entry of another tract by the "*legal assignee* of GILES EGERTON" had no reference to the *north*-east quarter of 18, in controversy; for, first, while the act [though its recitals are not evidence to impeach the senior patent] declares that such entry was authorized "in lieu of the quarter patented Jan'y 10, 1818, to *the* GILES EGERTON referred to in the act, yet *there is no evidence that there were not two sergeants in Cotton's Company, 26th Infantry, bearing the same name of* GILES EGERTON: and the law (as will be shown hereafter) raises *no presumption that there were not* in reality *two sergeants of that name* in the Company; but the courts *will* presume, until the contrary is shown, that the patent of Jan'y 10, 1818, referred to in the act of Congress, was to *another* and different GILES EGERTON than the one mentioned in the senior patent read in evidence by defendants below; and, secondly, the act expressly recites, *also*, that such entry was authorized "in lieu of the quarter" section

"*which had been previously patented to* JAMES DURNEY," and which quarter the unquestioned evidence (the patent to said DURNEY, itself, dated Jan'y 7, 1818) proves was the *south*-east (and *not* the *north*-east) of 18. 4*th.*—Even if the act be construed as having *possible* reference to the *north*-east 18, yet, nevertheless, the prominent fact stands out that there is no pretense of any attempt by THOMAS HART to convey said *north*-east quarter; hence THOMAS HART is the *only* "*legal assignee* of GILES EGERTON" as to that quarter. 5*th.*—Said *north*-east quarter was conveyed by EGERTON to said HART by the description of the deed involved in the reference to land patented to said EGERTON Jan'y 10, 1818. 6*th.*—No *original* copy of the grant or patent to any man of the name of GILES EGERTON, delivered to the soldier, was offered in evidence as to either the *north*-east or the *south*-east quarter: *nor is there any evidence whatever in the record* that the original copy of the grant or patent for the *north*-east was issued to the soldier, by mistake or otherwise, for the *south*-east instead of the *north*-east quarter, unless the *memorandum* on the margin of the record, undoubtedly *made by some mere clerk* in 1826 (or, so far as appears in this case, clandestinely made by some land-shark in the interest of the plaintiff below), is to have the effect of contradicting and vacating the solemn record of the Government. 7*th.*—HART, the only "*legal assignee* of GILES EGERTON" of the *north*-east quarter, never availed himself of any privilege under the act of Congress referred to, even if that act can be construed as having any reference to said *north*-east quarter. 8*th.*—The deed from CLEMSON to SHAW "was never recorded." 9*th.*—JOHN SHAW, who *did* avail himself of the act of Congress, has *never re-conveyed to the United States* either the north-east or south-east quarter; nor has anybody else. 10*th.*—GILES EGERTON'S land warrant, No. 13598 (the same referred to in the senior patent offered in evidence by defendants below), was located on the *north*-

east 18, in controversy, Jan'y 10, 1818. 11*th*.—At the time of the commencement of suit against them, the defendants below and their grantors had occupied and cultivated and had the full and undisturbed possession of the whole of the tract in controversy (the *north*-east q'r) for *more than twenty-five years*, (the whole thereof being under fence and cultivation,) they so holding the same under a judgment and deed for the taxes of 1839; and during all that time they also paid all the taxes and assessments levied or assessed on or against the land.

There is no evidence that Hart did not own the South-east as well as the north-west quarter.

THE LAW.

The errors assigned in this court (Record, folio 38,) involve the following propositions of law, under the facts thus recited; and I crave the particular attention of the court to the discussion of "The Doctrine of Estoppel," under the "IVth" general division of this argument. I do this because it was under an erroneous application of this doctrine, (as I understand the law,) that the court below was led to instruct the jury that the plaintiff was entitled to recover. But the other points involved, all more or less directly, go also to demonstrate the erroneous view taken by the court upon the question of estoppel.

I.

The patent of 1818 to EGERTON, for the land in controversy, was and still is in full force, and, either of itself or taken together with EGERTON'S conveyance to HART, constituted an outstanding title, by reason of which the defendant in error was not entitled to recover; hence the court below erred in giving the instruction for plaintiff below, and also in refusing the first of the instructions asked by defendants below.

I. All patents of land must be recorded. 1 Brightly's Dig. 465, clause 28.

II. Exemplifications of patents are of equal validity and force with the original copy of the grant delivered to the patentee. 1 Brightly, 463, cl. 9; 461, cl. 26; 465, cl. 27; U. S. *v.* Sutter, 21 Howard, 175; Patterson *v.* Wynn 5 Peters 239, 240, etc.; U. S. *v.* Vallejo, 1 Black, 554-5.

In the case last above cited this court remarks that: "It is well said in The United States *v.* Sutter (21 Howard 175,) that 'in every well regulated government the deeds of its officers, conveying parts of the public domain, are registered or enrolled *to furnish permanent evidence to its grantees of the origin of the title*.' An exemplification of such a record is admissible as evidence of *the same dignity* as of the grant itself." 5 Peters, 233. 15 Howard, 1. U. S. *v.* Vallejo, 1 Black, 454-5.

III. Even if it were proven (which it is not) that there was a mistake made in the copy of the patent or grant that was issued or delivered to GILES EGERTON, so that the land was described therein as the *south*-east quarter, instead of the *north*-east, on which latter the location was had; yet that mistake would not alter the fact that the grant was really for the proper quarter, (namely, the *north*-east,) for the simple reason that what is usually called "the patent" (i. e., the copy delivered to the patentee,) *is not the grant* at all, but only *evidence of the grant.*

1. A patent "*is not deemed a grant until the proper record is made.*" U. S. *v.* Vallejo, 1 Black, 555.

If there was a mistake as to the land, in what purported to be the copy of the grant (i. e., "the patent") which was delivered to EGERTON, then there was not only *no record* of any such grant as indicated by the instrument delivered, but the mistake could very easily have been resolved by reference to the *record* at Washington. This court has well said, in regard to so-called "patents," that

"All *doubts arising upon the copies* that may be *delivered* are resolved *by reference to the protocol* from which the

copies are taken, and *without which they have no authority.*" U. S. *v.* Vallejo, 1 Black, 555.

The same doctrine is held in U. S. *v.* Neleigh, 1 Black, 298; U. S. *v.* Knight, Ibid, 251; U. S. *v.* Castro *et al.*, 24 How., 347-9; U. S. *v.* Osio, 23 Ib., 273, etc.; and in U. S. *v.* Sutter, 21 Ib., 175.

Substantially the same rules as to recording patents existed by the laws of Mexico, under which several decisions of this court have been made, as prevail under our own laws. See 1 Black, 550, 552. At the latter page, sections 8 and 9 of the Mexican regulations, as to such records, are given. This court has held that, under those regulations, *a paper purporting to be a grant* of public land, *but not registered or recorded* in the proper book, is inconsistent with the known practice of every well-regulated government, which requires that such acts shall be enrolled; and that *a false note of the officiating secretary, at the bottom of the grant, that it had been registered, when it had not, can give no validity to such pretended grant.* U. S. *v.* Vallejo, 1 Black, 552-4-5; U. S. *v.* Castro *et al.*, 24 How., 346.

[*En passant.*—It follows, *a fortiori*, that a false memorandum entered on the margin of a record of a grant, no matter by whom, as in the case at bar, can have no effect upon the record, nor upon the validity of the grant.]

In the case in 1 Black referred to (U. S. *v.* Vallejo), this court also remarks that—

"We add, it is important, also, that a record should be made of these grants, so that the government may be advised in respect to the portions of the public domain that have been sold or disposed of, and as a security against the frauds of the public officers upon whom the power of making the grants has been conferred. Grants of this description, when made in due and orderly form, are either made at the seat of government, where the public

records are kept, and a record can be readily made, or, if signed by the public officer residing at a different place, *are not deemed grants till the proper record is made.*" * * "Without this safeguard, the officers making the grants, as in the present instance, the Governor and Secretary, would be enabled to carry with them in their travels blank forms, and dispose of the public domain at will, leaving the Government without the means of information on the subject till the grant is produced from the pocket of the grantee." 1 Black, 555.

A naked grant of land by government officers is *void.* Ibid., 550; U. S. *v.* Neleigh, Ibid, 298, etc.; U. S. *v.* Castro, 24 How., 346.

2. A patent is the "*record* of the Government of the "*existence and validity* of the grant." Teschemacher *v.* Thomspon, 18 California, 26.

"It is in the effect of the patent as *a record of the Government*, that its security and protection chiefly lie." * * "It was intended it should be an instrument of quiet and security to the possessor." Beard *v.* Federy, 3 Wallace, 492–3.

3. "The patent is but *evidence of a grant.*" U. S. *v.* Stone, 2 Wallace, 535; Teschemaker *v.* Thompson, 18 Cal., 27; Marbury *v.* Madison, 1 Cranch, 162.

4. And the *record* is the highest *evidence* of a grant.

A grant of public lands "must be found in the proper public office, among the public archives; *this is the highest and best evidence.*" U. S. *v.* Castro, 24 How., 350.

4. A patent granting land takes effect at its *execution*, no matter whether delivered or not. Hulick *v.* Scovil, 4 Gilm., 173–4; Marbury *v.* Madison, 1 Cranch, 156, 162, 167.

It follows from the foregoing considerations that even if there was issued to GILES EGERTON what purported to

be "the patent," or evidence of a grant of the wrong quarter (of which there is no proof in the case), yet the grant to him of the right quarter (*north*-east 18), was complete, and the title vested accordingly; and, moreover, that such instrument so issued to said EGERTON for any such wrong quarter was, for all purposes, simply *void*.

IV. If it be argued that, in issuing the patent of 1868 to LEONARD, the government officers treated the patent of 1818 to EGERTON as canceled, I reply that, apart from the judiciary, all the officers of the government combined, are and were devoid of authority to cancel, or treat as canceled, such senior patent. A patent cannot be set aside or annuled except by a *judicial tribunal*. The officer who issues a patent acts ministerially and not judicially.

"No officer of the Land Office is competent to cancel or annul the acts of his predecessor. This is a *judicial* act, and requires the judgment of a court." U. S. *v.* Stone, 2 Wallace, 535.

"A patent is the highest evidence of title, *and is conclusive against the government and all claiming under junior patents or titles*, until it is set aside or annuled by some *judicial* tribunal." *Ibid.*

A patent issued by the United States, regular on its face, can be *impeached or avoided*, if at all, save when issued without authority, *only* by a decree in a Federal Court; *not in an action at law* or any *collateral* action, but upon a bill in equity or *scire facias* instituted *directly for that purpose*, setting forth the grounds for avoiding the same. Boysnell *v.* Broderick, 13 Peters, 436; Patterson *v.* Wilson, 11 Wheat., 381–4; Polk's Lessees *v.* Wendall, 9 Cranch, 98–9; McCready *et al. v.* Goldsmith *et al.* 18 How., 87; Parmelee *v.* O. & S. R. R. Co., 7 Barb., 599; People *v.* Livingston, 8 Barb., 285–7; Jackson *v.* Marsh, 6 Cowen, 281; People *v.* Morrow, 5 Denio, 389, 398; Jackson *v.* Lawton, 10 Johns., 23; Jackson *v.* Hart, 12 John., 77; Williams *v.* Carpenter, 35 Mo., 69, 70; State *v.* Bachelder, 5 Minn, 223, 237, &c.; Stringer *et al. v.* Lessees of Young *et al.*, 3 Peters, 340–1; Boardman *et al v.*

Reed's Lessees, 6 Peters, 342; Hagar *v.* Lucas, 29 Cal., 309; Gray *v.* McConner, 14 Ill., 347–8; McGee *et al. v.* Wright, 16 Ill., 557; Bruner *v.* Manlove, 1 Scam., 161; McConnell *v.* Wilcox, Ibid, 353; Bennett *v.* Frazer, 2 Gill., 598.

A few of the authorities last referred to bear upon the want of authority in the State courts to impeach or avoid patents.

Mr. Chief Justice MARSHALL, in delivering the opinion of this court in Stringer *et al. v.* Lessees of Young *et al.*, 3 Peters, 340, 341, says:

"The patent is the completion of the title, and establishes the performance of every prerequisite. No inquiry into the regularity of those preliminary measures which ought to precede it, is made in a trial at law. *No case has shown that it may be impeached at law*, unless it be for fraud; not legal and technical, but actual and positive fraud in fact, committed by the person who obtained it; *and even this is questioned.*"

V. That neither the memorandum, endorsed on the margin of the Land Office record, nor the act of Congress, can have any possible legal effect to impeach the grant of the land in controversy to GILES EGERTON, necessarily follows as a corollary from what has already been demonstrated; but as I shall urge that the admission in evidence to the jury of either of these items is error, for which the judgment below should be reversed, their discussion in detail is reserved for the IIIrd general division of this Argument.

VI. The evidence is *conclusive* that the land in controversy (the *north*-east quarter 18) *was* granted by patent to GILES EGERTON in 1818. If there be any proof in the record (which I contend there is not) that the *south*-east quarter of the same section was patented to a man of the same name of GILES EGERTON, then the law is, no evidence appearing that there was *but one* GILES EGERTON in the

Company mentioned in the senior patent, that *it will not be presumed*, by the courts, *that there were not two soldiers of that name* in the army, and in the same company. And the *onus* of showing that there was but *one* GILES EGERTON, even in the same company, is on the party asserting the claim that there was but the one.

In the case of Montag v. Linn, 23 Ill. R., 551, a deed was in controversy containing a double description—one numerical and the other by reference as "being the same "tract of land gaanted to JOHN SILVER by the govern- "ment of the United States of America, for military "services," etc. The numerical description as originally inserted in the deed was erroneous, and had been altered, as was determined by the court by inspection. It was attempted to avoid this *alteration* by resort to the description afforded by the reference to the grant to SILVER, under the established proposition of law that "if there "be a mis-description by numbers in a deed, it may be "corrected by reference to the general description as "'being the same land granted,'" etc. The court decided that the grantee could not *alter* the numerical description, and *then* rely upon the general one. In discussing the matter, the learned and distinguished Judge (BREESE.) who delivered the opinion of the court, said:

"The argument is, that there being a perfect and unaltered description of the land, following the altered numerical description, makes the alteration immaterial. This seems to be a *petitio principii*—a begging the question, for *it is not admitted that the words* following the numerical description of the land *are, or were designed to be a description of the land granted.* The land granted was described by certain numbers, and that land thus described was the land, and the only land, granted by the government of the United States to JOHN SILVER. In the patent from the government to SILVER, the land is described by numbers, and *if it was shown there was but one* JOHN SILVER *in the army, in McIntosh's light artillery, the general*

description might be sufficient. In the deed, the grantor conveyed to COFIELD a tract of land by its numbers, describing it as the same land granted to JOHN SILVER, etc. Striking out the description of the land by its numbers, then, *the onus is on the party claiming under the deed to show affirmatively there was but one* JOHN SILVER *to whom land was granted by the government for military services*, and then identify that as the land in controversy." (23 Ill., pp. 556, 557.) * * *

"It may be there was *another* JOHN SILVER in the army of the United States, entitled to military bounty land. *It was incumbent on the appellant to rebut such a probability* by some evidence, *for such a probability might well arise as applicable to this case by the language of the deed*, if the numerical description be stricken out. Suppose the deed had been offered unaltered as for the south-east 24, could the court, on the trial, reject the numbers as surplusage, and permit a recovery on the reference clause, *without proof of there being no other* JOHN SILVER? *And by what authority would the court strike out of the deed any part of the description, which was not made to appear false?* Retaining the original description in the deed, as we are bound to do, *it plainly appears it was for a different tract of land than the one in controversy.* And the appellant had no right, or the parties under whom he claims, so to alter it as to meet his case. Such an act should not be tolerated for a moment, for if grown into practice by the tolerance of the court, no one can foresee the frauds and villainies which may result from it." Montag *v.* Linn, 23 Ill., 559, 560.

And the court below, having admitted the act of Congress in evidence on behalf of plaintiff below, I may ask, "by what authority" did it "strike out any part of the description, which was not made to appear false"? The act authorized the entry of another tract "in lieu of the "quarter patented to said GILES, on the 10th day of Jan'y, "1818, *which had been previously patented to James Durney.*" It appeared in evidence, affirmatively, from the patent to DURNEY, dated Jan'y 7, 1818, that the quarter "previously patented to" *him* was the *south*-east 18; and it "was *not* made to appear false," (what for the purposes of this case

I have the right to assume to be the fact,) that there were *two* sergeants named GILES EGERTON, in COTTON's Company, 26th Reg't, and that the GILES EGERTON referred to in the act was made the patentee of the *south*-east 18, on the same day that the *other* GILES EGERTON, (mentioned in the senior patent offered in evidence by defendants below,) became the patentee of the *north*-east 18. Retaining, then, both descriptions in the act of Congress, "as we are bound to do," under the state of the proofs in the case, "it plainly appears" that the quarter referred to in the act, in lieu of which an entry was authorized, was "a different tract of land than the one in controversy." Nor is it at all unreasonable to presume that there were in fact two sergeants in the same company of the same name. If they were relatives, as they probably were, it was very natural that they should have served in the same company; and it was very natural, also, that they should arrange at the Land Office to get adjoining tracts of land. Possibly they were brothers. There is no law against even brothers having the same Christian name. Indeed the writer knows of a family of the peculiar name of SMITH, formerly residing in Fulton county, Illinois, who so rejoiced in the euphonious name of SAMUEL SMITH that *four* members thereof were each named "SAMUEL." In after years a somewhat natural difficulty presented itself in the way of properly designating the various SAMUELS in conversation; so they came to be called respectively "OLD SAM.," "BIG SAM.," "LITTLE SAM.," and "BLACK SAM."

These *aliases* afforded a satisfactory solution as to the identity of the various members of the quartette, except when their signatures were needed, and then these modern SAMUELS would stand out in black and white, each in his own proper numerical glory, as "SAMUEL SMITH, the First," "SAMUEL SMITH, the Second," and so on to the end!

VII. The deed of GILES EGERTON to THOMAS HART, of July 29, 1819, passed the title of the *north*-east 18, (the land in controversy,) into HART. The description of the land in the deed was, "the *south*-east quarter of section "18," &c., "which q'r section was granted to the said "GILES, in consideration of his military services, as will "appear by a patent obtained from the General Govern- "ment, dated the 10th day of January, A.D. 1818." By reference to the patent mentioned we find that the land thereby "granted to said GILES" was the *north*-east 18. No other grant to said GILES is proven. The defendants below also proved that the *south*-east 18 was patented Jan'y 7, 1818, to JAMES DURNEY, as before stated: thus showing that there was a mistake in the numerical description contained in the deed to HART, and that the *intention* was to convey the *north*-east quarter, which in legal effect was done by the general description "which quarter section was granted to the said GILES," &c. The probability of the numerical description of the deed being correct is rebutted by proof that the *south*-east quarter had been granted to another, and did *not* belong to said EGERTON, but that the *north*-east quarter had been granted and *did* belong to him at the date of his deed. The general description being complete in itself, the intention of the parties will be carried into effect.

If the description of land in the conveyance be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars of the description, yet it shall pass by the conveyance, that the intention of the parties be effected. In other words, if there be a mis-description by numbers in a deed, it may be corrected by reference to a general description therein, and the mis-description will be rejected as surplusage. The law not only *allows* but requires this to be done. Lyman *v.* Leomis, 5 N. H., 408; Worthington *v.* Hilyer, 4 Mass., 196; Abbot *v.* Pike, 33 Maine, 204; Smith *v.* Marsh, 6 Cowen, 281; Blaque *v.* Gold, 4 Croke's Charles, 447, 473; Loomis *v.* McNaughton, 19 J. R., 449; Loomis *v.* Jackson, 18 J. R. 81; Stringer *et al.* *v.*

Young's Lessees *et al.*, 3 Peters, 344; Fenwick *v.* Gill, 38 Mo., 510; Dougherty *v.* Purdy, 18 Ill., 206; Montag *v.* Linn, 23 Ill., 557; Worden *v.* Williams, 24 Ill., 67, 74; Melvin *v.* Proprietor, &c., 5 Met., 15.

VIII. OUTSTANDING TITLE.—I take it that it has now been demonstrated that an outstanding title was established on the trial below, as resting in THOMAS HART—if not in him, then certainly in GILES EGERTON, by virtue of the senior patent. For the purposes of this branch of the defense, it is not essentially important in which of the two the outstanding title vested. It is enough that the paramount title was not in the plaintiff below.

That a defendant may protect his possession, in an action of ejectment, by showing an outstanding title, is a proposition of law so universally conceded, that I need refer to no authorities to fortify it.

II.

(1.) The location of GILES EGERTON's Land Warrant on the *north*-east 18, in controversy, January 10, 1818, had the effect to appropriate the land and reserve it from future sale, and also to establish a right in EGERTON that could have been enforced even before the patent was executed. There never has been any attempt to cancel this location, whatever may have been the effort to tamper with the record of the grant. Not only so, but after the location the power of the Land Office over the land, as against EGERTON's right, was at an end. The subsequent patent to EDWARD F. LEONARD (grantor of Defendant in Error), therefore was and is *void*: and this would be the case even had no patent been executed pursuant to the location. (2.) But as the case stands, the location and the patent are to be taken together, as one title, the location of the warrant operating *in aid of the patent*, and the two (location and patent), constituting a perfect title, under the doctrine of relation: (3.) hence the reason

becomes all the stronger why the younger patent is void and must perish.

I. Location of Warrant and Effect Thereof, &c.—(1.) By virtue of the warrant and location, the soldier acquired an absolute right to the land and to a patent. Act of May 6, 1812, 2 Stat. at Large, 729, §§ 2 and 3; Act of Dec. 24, 1811, *Ibid* 669, § 2; Act Jany. 11, 1812, *Ibid*, 672, § 12.

(2.) The Illinois Military Tract (in which the land in controversy is located), was set apart for soldiers' bounties. Act May 6, 1812, 2 Stat. at Large, 728, § 1, &c.

(3.) The location of a military land warrant establishes a right of possession on which ejectment may be maintained. A patent by the United States, executed in pursuance of the location of the warrant, is evidence that the right of possession acquired by the *location* of the warrant, had ripened into a perfect title, even though executed after suit brought. Gallup *v.* Armstrong, 22 Cal., 480; Butterfield *v.* Cent. Pacific R. R. Co., 31 Cal., 264.

(4.) Where a land certificate has been located, the power of the land office over the land is at an end, and a subsequent patent of the same land must yield to the certificate and location, though the patentee had no notice of it. Moyer *v.* McCullough, 1 Smith (Ind.) 211.

(5.) The patent is *evidence* of the interest held by the grantee under his *prior grant or location*, &c., and that the premises were then subject to appropriation in satisfaction of the claim, &c. Teschemaker *v.* Thompson, 18 Cal. 27.

(6.) And this court has held that *a right to a patent once vested is equivalent*, as respects the government dealings with public lands, *to a patent issued*; and that when issued, the patent relates back to the inception of the right of the patentee. Stark *v.* Storrs, 6 Wallace, 402, 410, 413, 417–18, &c.; Grignor's Lessees *v.* Astor, 2 How., 344.

This rule is available even to strangers to the transaction. 10 Howard, 372–3; 3 Wallace, 491.

(7.) "Where there are divers acts concurrent to make a conveyance estate, or other thing, *the original act shall be preferred;* and to this the other acts shall have relation." Landes *v.* Brant, 10 How., 372; Viner's Abr. title Relation, 290.

(8.) The right of EGERTON to the land in controversy on the location of his warrant, and before patent executed, was so far vested, and was so far property, that it could have been sold on execution against him, and the patent subsequently executed would have enured to the benefit of the purchaser under the execution sale. R. S., 1845, of Ill., pp. 300, 301, §§ 1, 3; Gross' Stat. Ill. (1871), 378, 379, §§ 1, 3; Landes *v.* Brant, 10 How., 348, 372, &c.

(9.) ☞ Where a person has regularly entered land, *and the Land Office canceled his entry and issued a patent to a third person* for the same land, *the patent and cancellation of the entry are both void.* O'Brien *v.* Perry, 1 Black, 132; Minter *v.* Crommelin, 18 How., 88.

(10.) If the register of a land office has duly admitted the location of land, and granted a certificate thereof, a subsequent sale of the same land is *void*, although made to a *bona fide* purchaser without notice. Moyer *v.* McCullough, 1 Carter (Ind.), 339.

(11.) A purchaser, who has done all that the law requires to entitle him to a patent for a tract of land, can not be affected by ignorance, negligence, or want of fidelity on the part of the government or its officers. Nelson *v.* Sims, 23 Miss. (1 Cush.), 383.

(12.) By virtue of a location of a genuine head-right, the locator acquires a vested legal right, protected by the constitutional guarantees of the right of property. Howard *v.* Perry 7 Texas, 259.

(13.) Where government land has been *entered or located*, "the Government can no more dispose of the land to another person than if the patent had been issued." Astrom *v.* Hammond, 3 McLean, 107, 109.

II. The Patent and Location taken together.—The location of the warrant and the patent are to be taken together and operate "as one act," making the legal title complete, under the doctrine of relation.

(1.) In the case of Landes *v.* Brant, 10 Howard, 348, referred to, this court, at pages 372, 373, discusses this rule of relation as follows:

An "ultimate perfect title" * * is "a confirmation and sanction by the political power of the imperfect title, and gives it complete legal validity; and to protect purchasers the rule applies, 'that where there are divers acts concurrent to make a conveyance estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation,' as stated in Viner's Abr. tit. Relation, 290. The doctrine of relation is well illustrated in Jackson *v.* Ramsay, by the Supreme Court of New York, 3 Cowen, 75, and recognized by the Supreme Court of Missouri in the case of Crowley *v.* Wallace, 12 Mo. R. 145."

"Cruise on Real Property, vol. 5, pp. 510, 511, lays down the doctrine with great distinctness. He says: 'There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.'"

After further remarks this court continues:

"Applying the doctrine of relation, and taking all the several parts and ceremonies necessary to complete the title together, 'as one act,' then the confirmation of 1811 and the patent of 1845 must be taken to relate to the first act; that of filing the claim in 1805. On this assumption intermediate conveyances made by the confirmee, or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title, and pass that title to the alienee. And on this ground the deed made by the sheriff to McNair is valid."

(2.) This doctrine is re-affirmed in Beard *v.* Federy, 3

Wallace, 491. See also Teschemacher *v.* Thompson, 18 Cal., 27. In the latter case Mr. CH. J. FIELD says, that "the patent gives precision to the title pre-existing." *Ibid.* And he also declares that the only persons against whom the action of the government is not *conclusive*, "are "those whose title accrued *before* the *duty* of the government" attached, etc. *Ibid.*

(3.) In the case of Bagnell et al *v.* Broderick, 13 Peters, 450, 451, this court remarks:

"In 1 Peters, 662, (Ross *v.* Barland) it was held that 'the entry and the junior patent could be given in evidence in connection *as one title*, so as to overreach the elder patent. The practice of giving in evidence a special entry *in aid of a patent*, and dating the legal title from the date of the entry, is familiar in some States.' * * Yet the entry can only come *in aid of* a *legal title*, and is no evidence of such title standing alone, when opposed to a patent for the same land. Where the title has passed out of the United States by conflicting patents, as it had in the case in 6 Peters, there can be no objection to the practice adopted by the courts of Mississippi to give effect to the better right, in any form of remedy the Legislature or Courts of the State may prescribe," 13 Peters, 450-1.

III. LAST PATENT VOID. FORMER LOCATION AND PATENT CONCLUSIVE ON GOVERNMENT AND ALL CLAIMANTS, EVEN AT LAW.

(1.) ☞.—Patents by the United States for land which it has *previously granted*, *or reversed from sale* or appropriated, are *void*. Reichart *v.* Felps, 6 Wallace, 160; Minnesota *v.* Bachelder, 1 *Id.*, 115; U. S. *v.* Stone, 2 *Id.*, 535-7; Stoddard et al *v.* Chambers, 2 Howard, 317-18.

(2). And "this is a question as well examinable *at law* as in chancery." Stoddart *et al. v.* Chambers, 2 How., 317.

In the case in 2 Howard, above referred to, at page 318, this court forcibly enunciates the doctrine for which I contend, as follows:

"No title can be held valid which has been acquired against law." * * "The issuing of a patent is a ministerial act, which must be performed according to law. *A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual.* The fee having been vested in the patentee by the first patent, the second could convey no right. It is true a patent possesses the highest verity. *It cannot be contradicted or explained by parol*, but if it has been fraudulently obtained, *or issued against law*, it is *void*."

Again:

(3). *When the State has no title* to the thing granted, or the officer has no authority to issue the grant, the acts of such officer are absolutely *void*, and are necessarily examinable at law. Ladiga *v.* Roland, 2 Howard, 581; Wilcox *v.* McConnell, 13 Peters, 498; Patterson *v.* Winn, 11 Wheat., 380; Polk's Lessees *v.* Wend, 9 Cranch, 87, 99; U. S. *v.* Arredondo, 6 Peters, 691; Minter *v.* Crommelin, 18 How., 87; Boardman *v.* Lessees of Reed *et al.*, 6 Peters, 328; People *v.* Livingston, 8 Barb., 253; Jackson *v.* Marsh, 6 Cowen, 281; Jackson *v.* Lawton, 10 John., 23.

(4). *As against the government and parties claiming under the government* by title subsequent, a patent of the United States issued upon a confirmation of a claim to land by virtue of a right or title derived from Spain or Mexico, *so long as it remains unvacated, is conclusive.* Beard *v.* Federy, 3 Wallace, 478, 492.

In the same case this court holds that—

"A patent is a deed by the United States. As a deed its operation is that of a *quit-claim, or rather a conveyance of such interest as the United States possessed* in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Commissioners. In the second place, the patent is a record of the action of the Government upon the title of the claimant as it existed," &c. *Ibid.*, 491.

Grants or cessions of public lands by the sovereign power are grants of only what then belonged to that

power. The property of individuals can in no way be affected thereby. Strother *v.* Lucas, 12 Peters, 435; Soulard *v.* U. S., 4 *Ibid.*, 511.

(5). In California it is also held that—

A land patent is conclusive evidence against the Government and claimants under the Government, by title subsequent, of the existence, validity, and confirmation of the grant as recited; and it also establishes the title of the patentee from the date of the grant. Stark *v.* Barrett, 15 Cal., 361; Mott *v.* Smith, *Idem.*, 533; Teschemacher *v.* Thompson, 18 Cal., 11, 25.

In the last cited case Mr. Chief Justice FIELD declares the manifestly correct propositions, that subsequent claimants take in subordination to the action of the Government, whether by patent or other claim which has attached; and that they are not entitled to any notice of its proceedings. 18 Cal., 25.

(6.) In the case of U. S. *v.* Stone, (2 Wallace, 535,) to which I have made reference before, this court uses the following language:

"Patents are sometimes issued *unadvisedly or by mistake, where the officer has no authority in law to grant them*, or where another party has a higher equity and should have received the patent. In such cases *courts of law* will pronounce them *void*. The patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land *reserved from sale by law*, such patent is *void* for want of authority. But one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court."

And again:

The survey and patent, under the laws of the United States, are *conclusive* evidence of the title to the land which they embrace, and where there are two confirmations of the same land, the elder must prevail. Willot *v.* Sanford, 19 How., 79.

(7.) A patent is a mere ministerial act, and, if issued for lands reserved from sale, is *void*. Perry *v.* O'Hanlon, 11 Mo., 585.

(8.) A new grant of land already granted is a mere nullity. Nichols *v.* Hubbard, 5 Richardson, (S. C.,) 267: Jackson *v.* Lawton, 10 John., 23.

(9.) Where the United States has no title the grant is *void*, and is *examinable at law*. Polk's Lessees *v.* Wendell *et al.*, 9 Cranch, 99.

(10.) Where land is *once appropriated to any purpose*, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it. Wilcox *v.* Jackson, 13 Peters, 449.

(11.) The doctrine of *estoppel* applies to a State as well as to private persons. So where a State grants lands to a town, having thus parted with all its interests in such lands, it is estopped from claiming afterwards any right thereto. Vermont *v.* Society for Propagation of the Gospel, 2 Paine C. O., 545, 556–7–8, &c. See also Commonwealth *v.* Pejepsent Proprietors, 10 Mass., 145.

In the latter case the Legislature, by resolve, had declared that a certain monument was considered the one mentioned and intended in an ancient deed, under which title was derived to certain proprietors; and it was held that the Commonwealth was estopped from afterwards showing that such monument was not the one intended by the deed.

And so I hold, not only that the Government, and all persons claiming under the Government, are estopped from claiming any right to the land in controversy, after the land warrant location and patent to GILES EGERTON, but also that they are estopped from denying, either by memorandums on the margin of records or by act of

Congress, what by solemn record of the same Government has been established.

If, for the sake of the argument, it is admitted to be true, as claimed in this case, that a mistake was made in issuing to GILES EGERTON what purported to be a copy of the grant to him, (which I do not admit, because there is no legal proof of it;) and if the *mesne* conveyances from THOMAS HART to JOHN SHAW for the *south*-east of 18, together with the entry by SHAW of another tract, under the act of Congress, be considered as evidence properly in the case—even then, *how did the title* of the *north*-east 18, in controversy, *get back into the United States*, so as to enable the Government to convey it, in 1868, to the grantor of the Defendant in Error? How did the United States become *re-invested*, in 1868, with what it had become divested, by warrant location and solemn grant, in 1818? For even if the act of Congress was intended to refer to the *north*-east 18, as the land in lieu of which an entry was authorized, (which it was not,) yet the United States was never re-invested with as much as an equitable interest in that tract, for let it be remembered that there was never any reconveyance to the Government of even the *south*-east quarter, much less of the *north*-east, nor was the entry made under the act of Congress by the "legal assignee" of the *north*-east quarter. Can it be *possible* that any legal mind can be wrought up to *imagine* that a blunder of a government clerk, and the entry by SHAW of a tract of land under the act of Congress, could have the magical effect of transferring the *title* of the tract in controversy back into the United States, so as to render it liable to sale and another grant in 1868? Can it be *conceived* that a blunder by a clerk, and the gift of a quarter section to Shaw, would effect what all the Departments of the Government combined could not accomplish, except only the judicial in a proper case made? For, unless the Government was re-invested with the *title*, then

it had no title to convey, in 1868, and nothing passed by the junior patent to the stealthy land-shark, who doubtless chuckled while imagining his claws fastened upon the throats of the honest settlers of over 25 years.

(12.) No matter into what shape this question may be turned; no matter even if *equities* could be traced into the Government, and through the Government into the Defendant in Error; yet the stubborn fact stands out, in bold relief, that by reason of EGERTON'S warrant and location, the land was not subject to entry and sale in 1868, and the other stubborn fact, also, that there was an older outstanding patent for the land; either of which facts should have sent the plaintiff out of court at the trial below. The elder outstanding patent of itself was enough to protect the defendants' possession against the plaintiff's claim. Colston *v.* McVay, 1 A. K. Marshall, 250; Thomas *v.* Head, *Idem*, 450; Voorhes *v.* Bridgford, 3 *Id.*, 26; Price *v.* Evans, 4 B. Monroe, 386; Gurno *v.* Jones, 6 Miss.,. 330; Peck *v.* Carmichael, 9 Yerg., 325; Love *v.* Gates, 4 Dev. & Balt., 363; Connolly *v.* Doe, 8 Black, 320; Wolfe *v.* Dowele, 13 S. & M., 103.

Where there are two legal titles, the elder must prevail in ejectment. Stoddard *et al. v.* Chambers, 2 How., 317.

In view of the law as set forth under this IId general division of my Argument, I maintain that both of the instructions asked by the defendants below, and refused, should have been given.

III.

THE MARGINAL MEMORANDUM AND THE ACT OF CONGRESS, ETC.

It was error in the court below to admit in evidence to the jury either (1) the memorandum endorsed on the margin of the exemplified copy of the patent of 1818, or

(2) the Private Act of Congress of 1827. (3) It was also erroneous to admit in evidence the deeds for the *south*-east 18, and the proof that JOHN SHAW entered a tract of land under said act. And for these errors the judgment should be reversed.

1. THE MARGINAL MEMORANDUM, endorsed on the exemplification of the patent of 1818, was evidence for no purpose whatever. The law neither requires nor authorizes the making or the record of any such memorandum, nor does it make a copy thereof evidence. In support of these views I submit the following authorities:

(1.) A certified copy of an instrument is admissible in evidence, only where the law requires it to be recorded, or expressly makes the copy evidence. N. Y. Dry Dock *v.* Hicks, 5 McLean, 111.

(2.) ☞ *Where the Commissioner of the General Land Office gave a certified copy of a grant, under which the plaintiff claimed, and annexed to it what purported to be a release by the original grantee to the Government, of the genuineness of which there was no proof, it was held that the plaintiff was not bound to read such release with the rest of the document.* Dikes *v.* Miller, 11 Texas, 98.

(3.) A fact required to be proved by record, can only be proved by such record or an exemplified copy thereof. No certificate of the clerk of its substance or effect will be sufficient. Drake *v.* Merrill, 2 Jones' (N. C.) Law R., 368.

(4.) *A certificate of a register of deeds, that,* in reference to a deed recorded by his predecessor, *the words "not sealed" were entered on the record opposite the names of the signers to the deed, is not legal evidence, as the register had no authority for entering statements of fact not in the original.* Farmers, etc., Bank *v.* Bronson *et al.*, 14 Mich., 361, 371. (Opinion by Mr. Justice COOLEY.)

The court say, in the above case, that "the original entry, being unauthorized, would not be evidence, and the copy would be equally incompetent." *Ibid*, p. 371.

(5.) *Indorsements on the back of written instruments, even*

of payments, are independent writings, in the nature of receipts or written declarations, and *can be read in evidence only after proof made that they are signed by the party sought to be charged, or have received his assent in some binding form.* Turrell *v.* Morgan, 7 Minn., 368 (and cases cited by counsel for defendant in error); Rosboorn *v.* Billington, 17 John. R., 182; 2 Greenleaf's Ev., § 527; Kimball *v.* Lawson, 2 Vt. R., 142; 16 Vt., 13; 2 Mass., 397; Bryan *v.* Buford, 7 J. J. Marsh., 335.

(6.) The mere recital in the clerk's Journal entry, is not sufficient to establish the fact that the verdict and judgment were rendered on Sunday, and thus to vitiate them. Knight *v.* Kelly, 10 Iowa, (2 Withrow,) 104.

(7.) A note by the Secretary of State appended to an act of the General Assembly, as published in pamphlet form, stating that the act was published in certain papers at a given date, is not evidence of the fact. Allen *v.* Dunham, 1 Iowa, (Greene,) 89.

(8.) Memoranda on the books of a bank, at a meeting of persons not shown to have been legally elected as directors, are not admissible in evidence in an action by a receiver of a bank against its president for the fraudulent appropriation of the securities belonging to the bank. Hayes *v.* Kenyon, 7 Rhode Island, 136.

"Memoranda kept by those not entitled to represent a corporation are not evidence, merely as such, of its doings." *Ibid.*, 145.

(9.) A false note of the attesting Secretary, at the bottom of a grant, that it had been registered, when it had not, can give no validity to such pretended grant. U. S. *v.* Vallejo, 1 Black, 549, 552, &c.

(10.) The testimony of Government officers cannot be received to supply or contradict the public records. U. S. *v.* Neleigh, 1 Black, 298; U. S. *v.* Castro *et al.*, 24 How., 346, &c., and 348, &c.

A patent "cannot be contradicted or explained by parol." Stoddard *v.* Chambers, 2 How., 318.

Then if the sworn statements of Government officers cannot be received to contradict or explain a patent, how comes it that an unsworn memorandum entered on the margin of the record in the case at bar, by nobody knows who, and for aught that appears at the instigation of the Defendant in Error--how comes it that such a memorandum is competent evidence to contradict the patent, as was held by the court below?

II. The Private Act of Congress, while it recites nothing that can have any legal bearing against Plaintiffs in Error, was incompetent evidence for any purpose. Its recitals of matters of fact are no proof of the truth of such recitals. Congress cannot legislate facts into being or out of being. It "has no power to *legislate the truth of facts.*" So far as the Act "recites facts, it is not a law." Nor is it within the power of Congress to legislate away a vested right, nor in any way to disturb or vary or impair the legal force of an existing *title.*

(1.) Courts are bound to take cognizance of a public Act of the Legislature, so far as it is a law; "but *so far* "*as it recites facts, it is not a law, and the courts are not bound* "*to recognize it as such. The Legislature has no power to* "*legislate the truth of facts. Whether facts, upon which rights* "*depend, are true or false, is an inquiry for the courts* to "make under legal forms; it belongs to the judicial depart-"ment of the Government. By the Constitution, the Legis-"lative and Judicial Departments are distinct. A citizen "is not estopped to deny, in the courts of the country, any "mere fact which the Legislature may choose to recite. "If he was, the Government would be a despotism, and the "Legislature might be a tyrant." Dougherty *v.* Bethune, 7 Geo., 92–3.

(2.) "A mere recital in an Act of Parliament, either "of fact or law, is not conclusive; and we are at "liberty to consider the fact or the law to be different from "the statement in the recital." Regina *v.* The Inhabitants of Houghton, 18 English Law & Equity R., 287, 294.

(3.) *When land is once appropriated to any purpose*, from that moment it is severed from the mass of public lands, and *no subsequent law or proclamation, or sale, would be construed to embrace it, or to operate upon it.* Wilcox *v.* Jackson, 13 Peters, 449.

(4.) Rights acquired by an individual, under the preemption act of May 29, 1830, cannot be impaired by a selection by the State of lands under a subsequent act of Congress. Lytle *et al. v.* The State of Arkansas, 12 Ark., (7 Eng.) 9.

Congress has no power to nullify titles once granted or confirmed by authorized officers. Reichart *v.* Felps, 6 Wallace, 160–5–6.

III. The deeds from THOMAS HART to SAM'L HUNT, and from HUNT to CLEMSON, and from CLEMSON to SHAW, for "the *south*-east quarter" of 18, and the proofs admitted showing that SHAW entered the N. W. 28, 5 N. 5 W., in 1838, were all irrelevant and should have been kept from the jury on the objections of defendants below. They had no possible bearing on the land warrant location upon, or the patent for the *north*-east 18.

IV.

THE DOCTRINE OF ESTOPPEL.

The doctrine of estoppel will undoubtedly be invoked by the Defendant in Error, for, strangely enough, it was this doctrine that led the court below to instruct the jury that the plaintiff was entitled to recover. If the doctrine was once mentioned in the argument, as applicable to the case, the fact has entirely passed from my recollection. Be this as it may, I had not the most remote idea, on the trial below, that any question of *estoppel* could cut any figure in the case, until it came to my knowledge after the finding, that in the opinion of the court, the defendants were cut off by estoppel from setting up the outstanding senior patent title; wherefore the ruling in favor of the

plaintiff. The motion for a new trial was not argued; hence no discussion of this point was had in the court below on behalf of the defendants.

The estoppel is claimed on the theory that, by mistake, a patent was issued to GILES EGERTON for the *south*-east 18, (before then granted to JAMES DURNEY,) instead of for the *north*-east quarter in controversy as intended, and that said *south*-east quarter passed by *mesne* conveyances to SHAW, who entered another tract under the act of Congress admitted in evidence.

It will be remembered, in passing, that there is no proof that the patent issued to EGERTON was for the south-east quarter, except such as may be drawn from the marginal memorandum on the record, and from the act of Congress. If I am correct in the hypothesis that neither the memorandum nor the act of Congress are competent evidence of any fact or facts thereby asserted, then there is no basis left even for the view of an estoppel held by the court below.

But, even if those items of evidence were properly admitted, I maintain, nevertheless, that, in any event, (1) there is no estoppel established, either at law or in equity, that the Defendant in Error can invoke in this case; (2) that if there be an estoppel, in any possible view of the case, it is an estoppel *in equity* that cannot be set up in an action *at law;* and (3) that, in no view of the case, can an estoppel operate to vacate the land warrant or the patent, nor render nugatory the tax title and possession under which Plaintiffs in Error hold.

I take it to be established, in the foregoing pages, that the *north*-east quarter in controversy was in reality patented to EGERTON, no matter whether the instrument "issued" to EGERTON was for the *south*-east or not. That EGERTON's deed, (if there was but *one* GILES EGERTON,) conveyed the

north-east quarter to HART there is no question; but that HART ever conveyed or attempted to convey said north-east quarter there is not the shadow of proof. The *mesne* conveyances down into SHAW are for the *south*-east *only*, and without any other description or reference. If it be argued that the *intention* was to convey the quarter that had been patented to GILES EGERTON, which was the *north*-east; I answer, first, as has been demonstrated, that there is no proof that there was not *another* sergeant GILES EGERTON to whom a patent had issued for *south*-east quarter, by mistake, on Jan'y 10, 1818: and if there was, then *that* was the EGERTON who conveyed to HART the *south*-east quarter, by both the specific and general description—and, secondly, that if the GILES EGERTON to whom the *north*-east quarter was patented be the only EGERTON, and the one who conveyed to HART, and if HART attempted to convey the tract so patented to said GILES, then only an *equitable title* to the *north*-east quarter passed from HART down into SHAW. And I again call attention to the fact, moreover, that even that equitable title (if any such existed) was never deeded by SHAW or any one else to the United States. If it ever passed at all, it was only by matter *in pais*, SHAW having taken another tract under the act of Congress "in lieu," &c. But it has been shown that the quarter "in lieu" of which that other tract was entered was the *south*-east quarter, "which had been previously patented to JAMES DURNEY."

☞ It is also important to notice the salient fact that the private Act of Congress only authorized the "*legal* representative or *assignee* of GILES EGERTON" to enter the tract "in lieu," etc., and the further fact that HART, who was the *only* "*legal* assignee" of EGERTON, never availed himself of the act. And I call attention, also to the further fact that the deed from CLEMSON to SHAW *was never recorded*, and there is no proof that LEONARD ever

knew of that deed when he got his junior patent; hence, here again the equities fail.

I. Then, no *legal title* having passed out of HART for the land in controversy, and the "*legal* assignee" of EGERTON never having taken advantage of the Act of Congress, the whole basis of the supposed estoppel vanishes to the winds. And there is no estoppel *in equity*, even, not only for the reason just indicated, but also because the proofs fail to show that there was not a second sergeant GILES EGERTON, from which negative circumstance, (if it existed,) and from which alone, the inference might be drawn that it was intended to pass the title shown to have been patented to *a* GILES EGERTON down to SHAW by the *mesne* conveyances, and because, also, neither the defendant in error, nor his grantor, are shown to have had knowledge or notice that any equities that may have been in CLEMSON (if any) had been conveyed to SHAW. And this being the case, the Defendant in Error stands in no privity, through the junior patent, with any equities that might be imagined in the case. He is not in the most remote privity with the EGERTON to whom the land in controversy was patented.

(1.) No person can rely upon an estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. Mutuality is a requisite to all estoppels. Deery *v.* Cray, 5 Wallace, 795; Nutwell *v.* Toungue's Lessee, 22 Md., 419; Williams *v.* Candler, 25 Texas, (Walker,) 4; Bernal *v.* Lynch, 9 Wall., 313.

(2.) "It is clear that a stranger cannot be bound by, nor take an advantage of an estoppel. An estoppel to be binding must be reciprocal, and parties and privies only are bound thereby." Robinson *v.* Bates, 3 Metc., 40.

See also Kitzmiller *v.* Van Rensselaer, 10 Ohio, St. R. 63; Harrison *v.* Gray, 49 Maine, 537; Stinson *v.* Sumner,

9 Mass., 143; and especially Dearborn *v.* Taylor, 10 N. H., 153.

(3.) The estoppel "only arises in suits founded upon the instrument which contains the recital or growing out of the transaction in which it is given, and not in other or collateral controversies, even between the same parties." 4 Texas, 11, and cases cited.

(4.) The doctrine of estoppel is only available to the party for whom it was designed, and not for a stranger, to whom the representation on which it is based was not made. N. Y., etc., R. R. Co., *v.* Schuyler, 38 Barb. 534.

(5.) As understood and applied in modern times there is nothing harsh or unjust in the law of estoppel. It can be used only to subserve the cause of justice and right. Buckingham v. Hanna, 2 Ohio, (N. S.,) 551.

It may be inquired, right here, how "the cause of justice and right" can be subserved by allowing a land plunderer, at an outlay of $200, to rob the hard-working settlers of 25 years of property worth $10,000? And this, too, when such settlers have been in full possession all that 25 years and over, under a tax-title deed, and which was recorded nearly 24 years of the time, thus giving notice to the world of their title by record, as well as by possession? And this, too, moreover, when neither the junior patentee, nor his grantee, are proven to have been misled by any supposed matter *in pais?* For let it be remembered that CLEMSON'S deed to SHAW was never recorded; and the first time it figured in this case was when it was introduced in evidence on the trial below.

(6.) An equitable estoppel never takes place, unless the party seeking to avail himself of it has been actually misled. Jewett *v.* Miller, 10 N. Y., (6 Selden,) 402, 406; Brubaker *v.* Okeson, 36 Penn., 519.

The doctrine of estoppel is highly equitable in its nature. 10 N. Y., 407.

"*It is essential to an equitable estoppel* by matter *in pais, that he who sets it up, should show that he has been misled to his hurt.*" Brubaker *v.* Okeson, 36 Penn., 519, 522, and cases cited.

There is no estoppel *in pais* unless the party who sets it up has, by the acts or declarations of the other party, been induced to believe the existence of facts inconsistent with the claims of such other party, and acted on such belief. Lawrence *v.* Brown, 1 Selden, (N. Y.,) 394.

The very definition of estoppel is when an admission is *intended to lead and does lead* a man with whom a party is dealing into a line of conduct which must be prejudicial to his interests, unless the party estopped be cut off from the power of retraction. So, an estoppel affecting the right of a party in real estate, may be created by matter *in pais*, consisting of acts and declarations of a person, *by which he designedly induces another to alter his position, injuriously to himself.* 3 Hill, 219; Brown *v.* Wheeler, 17 Conn., 345; Kinney *v.* Farnsworth, *Id.*, 355.

There must be a willful intention to mislead, or at least such conduct as to *deceive*, a *reasonable* man to his prejudice, in order to create an estoppel. And "by the term *willful*, it must be understood, if not that the party represents that to be true which he knows to be untrue, at least *that he means his representation to be acted upon*, and that it is acted upon accordingly." Freeman *v.* Cook, 2 Wells. H. & G., 653.

"An equitable estoppel will be created when a person, by his acts or declarations, *designedly induces* another to alter his position injuriously to himself. *It only arises when the conduct of the party estopped is fraudulent in its purpose, or injurious in its results.*" Williams *v.* Chandler, 4 Texas, 11.

Now, tested by these rules, how can there be any estoppel in this case, even in equity? The Plaintiffs in Error are in no way connected with any matter *in pais* that is set up by way of estoppel. They have acquired the title to the land in controversy that was in EGERTON and HART,

through the judgment of 1840, and deed of 1843 thereunder, for taxes, or, rather, have barred that title by limitation, through occupancy and payment of taxes under "claim and color of title," as I shall demonstrate hereafter; and this is the only way they are proven to be connected with EGERTON'S or HART'S interest. Then, of what matter *in pais* have *they* been guilty, which can work an estoppel in favor of the land-shark LEONARD or his grantee?

If it be said that we are setting up the elder outstanding patent title, and hence must stand in the shoes of the supposed holder of that title, so far as the same is in question, I reply that even if HART had been defendant below, he would not have been estopped from setting up such elder patent title under the rules above laid down. What did HART do, or leave undone, to *mislead* this *innocent* land-shark, who wants his $200 to swell into $10,000, by means of this law-suit? He (HART) made no attempt to convey the land in controversy. He deeded only the *south*-east quarter. And wherein has LEONARD, or his figure-head plaintiff, shown that by HART'S conveyance of the *south*-east quarter, he was *misled* into the idea that the *title* to the *north*-east swung back into the Government, and therefore he was induced to act and "alter his position" to the tune of $200, in obtaining the junior patent, in the hope of pocketing $10,000 thereby?

If it be answered that HART intended to convey whatever title he acquired of EGERTON, and supposed he had done so by his deed for the *south*-east, and that the equitable title for the *north*-east quarter thereby passed, I reply that that is a *non sequitur*, because it depends upon whether or not there was a second GILES EGERTON to whom a patent had issued by mistake, for the land "previously patented to JAMES DURNEY;" and, secondly, I reply, that "a party is not estopped by his admission or assertion of "a conclusion of law" (Brewster *v.* Striker, 2 Comst., 19),

so that even if HART had intended to convey as indicated, or had even represented that his conveyance was for the *north*-east, it would have been a mistake as to the legal effect or "conclusion of law" in respect to what he really had done; hence he would not have been estopped.

Neither would HART have been estopped, for the further reason already suggested, that the "*legal* assignee" of EGERTON never entered any tract under the act of Congress, and the junior patentee, LEONARD, knew, if he knew anything [and he is presumed to know the law,] that ~~he himself~~ was *not* such "legal assignee" as to the *north*-east quarter, and had no more right to make an entry under the Act "in lieu" of that quarter, than had Nebuchadnezzar of old. He could not possibly have been misled as to said *north*-east quarter. On the other hand, he was well aware that ~~he~~ *was* the "legal assignee" of whatever interest said HART had in the south-east quarter.

(7.) The rights which Plaintiffs in Error acquired under the judgment for taxes, and by reason of their possession and payment of taxes, will not be overlooked by this court, and could not have been overlooked by LEONARD before he obtained his patent of 1868, for their possession, apart from their recorded deed, was notice to the world of their claim; and this court will not permit these rights to be overreached by any mere fiction of law—certainly not by the doctrine of estoppel, which is based upon the broad foundations of *equity*.

When a party purchases land in the possession of a third person, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights of the possessor, and he cannot set up the want of notice to protect himself. Brewer *v.* Brewer *et al.*, 19 Ala., 481.

The junior patentee "has been misled to his hurt" by nobody—certainly not by Plaintiffs in Error, of whose

rights and claim the law charges him with full notice. Nor has he been by anybody "designedly induced to alter his position, injuriously to himself;" nor yet has there been any "such conduct as to deceive a *reasonable* man to his prejudice." Such being the case, the Defendant in Error, who takes no greater rights than his grantor possessed, occupies no attitude enabling him to invoke an estoppel, even in equity.

II. ☞ ESTOPPEL IN EQUITY.—But whatever view may be taken of this question of estoppel by your Honors, there cannot be *tortured* out of it anything more, at the most, than an estoppel *in Equity*. And if *this* is what is claimed, the very claim itself will put an end to the case at bar, for *an estoppel in equity cannot be asserted in a proceeding at law.*

(1.) "There is no rule of practice better settled than that an equitable title forms no bar to a recovery in ejectment." Wales *et al v.* Bogue, 31 Ill., 468.

(2.) The *legal title* to land must always prevail in an action of ejectment, and *such title cannot pass by fraudulent representations, or by acts or conduct in pais*, without deed. Smith *v.* Munday, 18 Ala., 185.

(3.) *When circumstances dehors the grant are relied upon to avoid a patent, the grant is voidable only by direct suit for the purpose.* Jackson *v.* Hart, 12 John., 77.

(4.) Estoppels *in pais* relating to real estate *cannot be made available in a court of law.* Flake *v.* Fash, 44 Ill., 302, 305.

(5.) An estoppel *in equity* cannot be asserted in a trial *at law.* Bishop *v.* Blair, 36 Ala., 80, 86; Miller *v.* Graves, 38 Ill., 466, and cases cited.

(6.) An equity cannot be set up at law, in ejectment. This must be asserted in a court of equity to vest the legal title in the equitable holder. Williams *v.* Carpenter, 35 Mo., 70.

(7.) ☞ And now I advance a step further, and insist that even if HART or EGERTON, or both (in whose shoes, or in the shoes of one of whom, it may be argued that we stand when interposing an outstanding title); if either or both of *them* had induced LEONARD to enter the land in controversy and procure his junior patent, and even, moreover, if HART, for instance, had been occupying the place of the defendants below on the trial of this cause, yet, nevertheless, even then, the plaintiff below would not have been entitled to recover.

If one, having the *legal title* to land, *induces another to purchase it under execution against him, he is not thereby estopped*, in a *court of law*, from showing that the sale was *void*, and passed nothing to the purchaser. Smith *v.* Munday, 18 Ala., 182; McPherson *v.* Walters, 16 Ala., 714.

III. Without any further discussion of the doctrine, and without further demonstration of the absurdity of the idea that there is any ground in the case at bar for its application, I leave the Defendant in Error to illustrate (if he can) how any theory of estoppel, by matters *in pais*, can operate to vacate and render invalid the military land-warrant location and the solemn grant by patent, and thus restore the land in controversy to a condition for other lawful appropriation or sale; and, secondly, to demonstrate (if he can) how any such estoppel hypothesis can be made to wipe out the judgment, sale and deed for taxes, and the rights, by possession and limitation thereunder, that are vested in the Plaintiffs in Error.

V.

THE TAX-TITLE AND POSSESSION, ETC., THEREUNDER.

The Plaintiffs in Error and their grantors, at the time of the trial below, had occupied the entire quarter in controversy (having the whole thereof under fence and culti

vation) for more than 25 years, under a tax-title accrued for non-payment of the taxes for 1839, and paid all the taxes and assessments thereon for the years 1844 to 1868 inclusive.

Now if the interest of the Federal Government in the land had not been divested, and if the legal title also remained in the United States, then I admit that the tract was not liable to taxation, and that the tax title and the rights flowing therefrom would therefore fall, because land owned by the Government is not liable to taxation; but it has been shown, in the foregoing pages, that the United States parted with its interest through the location of the military land-warrant, and that it perfected the title in EGERTON by the grant.

(1.) The land was liable to taxation as soon as the warrant was located thereon, and remained so liable, regardless of any question as to the title having passed by patent. The location of the land-warrant created at least an inchoate title; and "no principle is better settled in "this country than that an inchoate title to lands is prop-"erty." Delassus *v.* United States, 9 Peters, 133.

Lands entered or located are liable to be taxed as well before patent issued by the United States as after. Astrom *v.* Hammond, 3 McLean, 107–9.

And so such lands are also "subject to seizure and "sale by execution." Landes *v.* Brant, 10 Howard, 372, 373.

"All property, real and personal," with certain exceptions, is liable to taxation in Illinois, and was in 1839. R. S. Ill. (1845,) 436, §1. The same provision was in force years before the revision of 1845.

(2.) Such being the law, the defendants below were protected in their possession under the limitation laws of

both seven and twenty years. R. S. Ill., (1845,) 104, §8; *Idem*, 349, §7; Gross' Stat., (1871,) 85, §8; *Id.*, 429, §6.

"Claim and color of title," under §8 of the conveyance act referred to, may be a claim of title less than "color." "A title absolutely void in its inception, when held by a grantee of the purchaser at a void sale, unless chargeable with fraud, is claim and color of title made in good faith within the meaning of the statute." Chickering *et al. v.* Failes *et al.*, 26 Ill., 520. See also 17 Ill., 501, and Cole *v.* Pennoyer, 14 Ill., 159. "Any instrument, indicating an intention to pass a title to lands, of which a description is given, from one party to another, gives color of title to the lands described." McCagg *v.* Heacock *et al.*, 34 Ill., 478. An unsupported tax deed is "claim and color of title," and payment of taxes and possession under the same, for seven years, creates a bar under the statute. Webster *et al. v.* Webster, 55 Ill., 325. And the limitation will run in favor of a party having claim and color of title, although he may have actual notice of an adverse claim by record or otherwise. Cook *v.* Norton, 43 Ill., 391.

That a complete bar was established also under the twenty years' rule, as well by the Illinois statute as under the common law. See Davies *v.* Easley, 13 Ill., 192; Turney *v.* Chamberlain, 15 Ill., 273-4; Clark *v.* Lyon, 45 Ill., 388.

The defendants below, then, were completely protected in their possession, under their tax deed, payment of taxes and possession of over 25 years; yet according to the ruling of the court below these hard-earned rights, as well as the land-warrant location and the solemn grant by the United States government, were all impaled by some fancied estoppel *in pais*, for which my clients are no more responsible than they are for the condition of the Hottentots. Thus a few individuals, strangers to the rights

of the Plaintiffs below, and acting in their personal capacities, are made potent to accomplish what all the officers and all the departments of the government combined (the judicial, under certain circumstances, alone excepted) are powerless to do.

Whatever else it might do, no doctrine of estoppel could remove the land from liability to taxation. Through this liability Plaintiffs in Error acquired their rights, and are thus shown to be no mere interlopers, but to have substantial equities, as well as legal interests, that ought to be protected by every court of justice against the prowling land-robbers, who stealthily crawl among the public records, in search of technical *flaws* through which to grasp for wicked gain.

Respectfully submitted, &c.

S. CORNING JUDD,
Attorney for Plaintiffs in Error.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1872.

No. 113.

CALVIN BRANSON and
NATHAN LINDSEY,
Plaintiffs in Error,
vs.
JACOB WIRTH,
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Error to the Circuit Court for the Southern District of Illinois.

ARGUMENT FOR DEFENDANT IN ERROR,

By Horatio C. Burchard.

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STATEMENT OF THE CASE.

Pleadings.

Jacob Wirth, defendant in error, brought suit in the court below against Calvin Branson and Nathan Lindsey, the plaintiffs in error, in ejectment, for the possession of the north-east quarter of

Section 18, township 4, north of range 2, east of the 4th Principal Meridian, in the county of Fulton and State of Illinois, to which he claimed title in fee.

The general issue was plead and the cause tried by a jury.

II. It appears, from the evidence in the case; 1st. A patent was issued by the United States in February, 1868, granting the quarter section in controversy to Edward F. Leonard, who conveyed to defendant in error in April, 1869.

2. The records of the General Land Office at Washington show that on the 10th day of January, A. D. 1818, bounty land warrant No. 13,598, issued under the "Act of the 6th of May, 1812, to Giles "Egerton, late a sergeant in the company commanded by Captain "Salmon C. Cotton, of the 26th regiment United States Infantry," was located, according to law, in favor of said Giles Egerton, upon said quarter section. (Record, folios 20, 21.)

3. The records of that office also show the record of a patent reciting the deposit by Giles Egerton of a warrant in his favor, numbered 13,598, and purporting to grant to said Giles Egerton, "late a sergeant in Cotton's company of the 26th regiment of infantry," the north-east quarter of Section 18, &c, (the land described in the declaration.) (Record, folio 22.)

On the margin of which record appears the following entry: "This patent was iss'd for the S. E. ¼, instead of the N. E. ¼, as "recorded; sent certificate of that fact to E. B. Clemson, at Leban- "on, Ills; see his letter of 19 May, 1826." (Record, folio 22.)

4. Giles Egerton executed to Thomas Hart a deed bearing date the 29th day of July, A. D. 1819, which contains the following description of the real estate conveyed: "The south-east quarter "of Section eighteen of township four north, in range two east, in "the tract appropriated by the acts of Congress to the late army of "the United States, in the State (once the Territory) of Illinois, "which q'r section was granted to the said Giles in consideration of "his military services, as will appear by a patent obtained from the

"General Government, dated the 10th day of January, A. D. 1818." (Record, folios 22, 23.)

5. Thomas Hart, on the 12th day of May, A. D. 1824, conveyed the said *south-east* quarter of Section 18 to Samuel F. Hunt, who, on the 7th day of April, A. D. 1825, conveyed the same to Eli B. Clemson, and said Clemson and wife, on the 20th day of October, A. D. 1829, conveyed the same to John Shaw. (Record, folios 25, 26, 27.)

6. John Shaw, on the 6th day of April, A. D. 1838, entered with the register of the land office at Quincy, Illinois, the N. W. ¼, 28, T. 5, N. R. 5, W. of the 4th P. M., (Record, folio 28,) in pursuance of an act of Congress approved March 3d, 1823, entitled, An Act for the relief of the legal representative of Giles Egerton, which authorized "the legal representative or assignee of Giles "Egerton, late a sergeant in Cotton's company of the twenty-"sixth regiment of infantry," "to enter with the register of the "proper land office, any unappropriated quarter section of land in "the tract reserved for the satisfaction of military bounties in the "State of Illinois, in lieu of the quarter patented to said Giles, on "the 10th day of January, one thousand eight hundred and eighteen, "which had been previously patented to James Durney." (Record, folio 27.)

The records of the land office also show a patent from the United States, dated the 7th day of January, A. D. 1818, granting the said *south-east* quarter of Section 18 to James Durney. (Record, folio 23.)

7. The evidence also shows that a tax deed of the land in controversy (the N. E. ¼, Sec. 18,) was executed by the sheriff of Fulton county, Illinois, on the 14th day of November, A. D. 1843, to Thomas Gridley, in pursuance of a sale and judgment against the land for the taxes assessed against it in the year A. D. 1839, and that through successive *mesne* conveyances, in February, A. D. 1849, all the title and rights said Gridley acquired by the sheriff's deed, became vested in said plaintiffs in error, and that they and

their grantors respectively, each during the time they had title under such sheriff's deed, paid all taxes and assessments levied upon the land, and were in the possession and occupancy of and cultivated said land from the year 1843 to the year 1868. (Record, folios 24, 25.)

III. The marginal entry on the record of the patents to Giles Egerton was admitted in evidence under objection from plaintiffs in error, and they also objected to the admission of the deeds of *mesne* conveyance from Hart to Shaw, and of the act of March 3, 1827, and of the proofs of the entry by John Shaw, under the provisions thereof, on the ground of incompetency and irrelevancy. (Record, folios 22, 26, 27, 28.)

IV. Upon this evidence the instructions of the court, verdict of the jury, and judgment rendered were in favor of the defendant in error. (Record, folios 28, 29, 30.)

V. The plaintiffs in error assign as errors :

The admission of the evidence to which they objected ;
The giving and refusing instructions ;
The refusal of a new trial, and
Rendition of judgment upon the verdict. (Record, folio 38.)

The counsel for plaintiffs in error insists that the evidence establishes the issue of a patent to Egerton prior to the patent to Leonard, and that thereby an outstanding title in Egerton or his grantee, Hart, defeats the right of defendant in error to recover in this action. He also claims that the location of the soldier's bounty warrant upon the land in question is a bar to the recovery, and that their tax title and possession also are sufficient defence. In answer to the argument of counsel for plaintiffs in error, I submit that the evidence seems satisfactorily to establish the propositions to which I here invite the attention and consideration of the Court.

Egerton's Patent Granted the South-East Quarter.

The evidence discloses that, although Giles Egerton was en-

titled to receive upon his location a patent for the *north*-east quarter, the patent he actually received was for the *south*-east quarter of section eighteen, township four, north of range two, east of the 4th P. M., in Illinois.

Four independent facts seem conclusively to establish this :

1st. The marginal entry on the record.
2nd. The recitals in Egerton's deed to Hart.
3d. The conduct of the subsequent grantees.
4th. The recitals in the act of Congress of March 3d, 1827.

The Marginal Entry.

The record by which the plaintiffs in error seek to establish the existence of a patent of the land in question to Giles Egerton itself contains evidence that no patent was issued to him for the north-east quarter, but that in lieu thereof and by mistake the patent signed, sealed and transmitted was for the *south*-east quarter. The memorandum of this fact was written upon the face of the record. It has stood there nearly fifty years. It can not be presumed to have been made without the authority or sanction of the officer having charge of the records. The records, books and papers of the General Land Office were under the custody and control of the Commissioner. (1 Brightly's Digest. page 462 ¶4

Whether the Commissioner or officer having charge of the record properly made or ordered the entry appearing on the margin of the record, such entry was of record and upon the page of the record of the alleged patent, when the Commissioner, in 1868, was requested to give and made the exemplified copy of the record. He had no right to separate them. They were the record as he found it, and as it stood prior to the passage of the act of July 4th, 1836, under which the certified copy was admissable in evidence, and which made it his duty "to cause to be prepared "and to certify, under the seal of the General Land Office, such "copies of records, books and papers on file in his office, as may "be applied for to be used in evidence in courts of justice."— 1 Brightly's Digest, page 463; Land, § 9.

A patent issued by mistake or through fraud may, before delivery, be cancelled.

Opinions of Attorneys General, Vol. 1, page 699.
" " " " 2 " 41.
" " " " 1 " 458.
Public Lands, Laws and Instructions, Vol. 2, page 28.

Although the patent had been signed, sealed and recorded, there seems to be no question in regard to the power of the Commissioner in such cases to suspend delivery.

How should the cancellation of a recorded patent or facts officially known to the Commissioner, affecting its validity or the correctness or truthfulness of the record itself, be evidenced by the Commissioner? Not by the destruction or alteration of the original, but by writing upon the patent and the record a statement of the cancellation, non-delivery, suspension, revocation, erroneous or fraudulent issue, or other facts officially known to him to impair its validity.

In cases where it had been the practice of locators in the Virginia military district in Ohio, to withdraw their location, this Court, in Galt vs. Galloway, 4 Peters, 332, said:

Since locations were made in the Virginia military district in Ohio, it has been the practice of locators, at pleasure, to withdraw their warrants both before and after surveys were executed. This practice is shown by the records of the Land Office, and is known to all who are conversant with these titles.

The withdrawal is always entered on the margin of the original entry, as a notice to subsequent locators; and no reason is necessary to be alleged as a justification of the act. If the first entry be defective in its calls, or if a more advantageous location can be made, the entry is generally withdrawn.

The entry made upon the record in reference to Egerton's patent seems to have the approval of this Court, as to the manner of calling attention to matters affecting a record.

2. *The recitals in Egerton's deed.*

Egerton, in his deed to Hart, recites and states that he grants " the *south*-east quarter of section eighteen, of township four north,

in range two east, in the tract appropriated by the acts of Congress to the late Army of the United States in the State, (once the Territory) of Illinois, *which quarter section was granted to the said Giles in consideration of his military services,* AS WILL APPEAR BY A PATENT *obtained from the General Government, dated the* 10*th day of January, A. D.* 1818."

Egerton declares in this deed, that it will appear by his patent, obtained January 10th, 1818, that the south east quarter of section 18, &c., was granted to him in consideration of his military services.

He doubtless then had in his possession the patent actually issued to him on the 10th of January, A. D. 1818, and from it himself drew, or the scrivener for him, the deed to Hart. The deed itself supports this conclusion ; it contains internal evidence of the fact. The description of the tract, the recitals of Egerton's title and consideration for which he obtained a patent, and date of its issue, must have been taken from the patent.

The particular quarter section upon which a bounty land warrant should be located in a military tract was then determined by lot, and not by selection, as at present. (Act, April 29, 1816, Land Laws, Vol. 1, page 702.) The soldier held no certificate of location. His patent was the only evidence furnished him as to what tract he had become the owner of.

This recital and these facts raise a strong presumption, and satisfactorily prove that the patent signed by the President and delivered to Egerton was for the *south*-east, and not for the *north*-east quarter.

3. *The conduct of Egerton's grantees.*

It is evident that there was a mistake in the patent to Egerton, as intended to be issued, or in the deed from him to Hart, and in the mesne conveyances from Hart to Shaw. If the successive deeds followed the patent, each purchaser inspecting the title papers of his grantor would have no occasion to question the validity

of the title he was about to acquire. When, however, it appeared that an elder patent had been issued to James Durney for the *south-east* quarter, it behooved the last grantee, tracing title to that tract through Egerton, to examine his title papers and ascertain and have rectified any mistake occurring therein. To do this necessitated a comparison of deed with prior deed and with the patent. If a misdescription had occurred in any mesne conveyance, or in the deed from Egerton to Hart, the mistake would have been sought to be corrected by a new deed from Egerton, or a bill in chancery had he refused to execute one. The conduct of the parties—the grantees of Egerton—shows that no mistake was discovered in the deeds, and no variance in them from the patent. No new deed appears to have been executed or proceedings instituted to correct a mistake in the deeds and make them correspond with the patent.

On the contrary, the grantee came to the United States claiming that his deed and the patent to Egerton were conveyances of the *south*-east quarter of Section 18, and that as the tract had been granted by an elder patent to James Durney, the government should give the legal representative or assignee of Giles Egerton the right to select another quarter section in lieu thereof.

The fact that James Durney's patent for the south-east quarter was older than Giles Egerton's must have been ascertained *by an examination of the latter.*

Clemson, in whom, by the *mesne* conveyances, Egerton's title at the time of the passage of the act of Congress for his relief had become vested, evidently discovered that he had a perfect chain of title from the United States to the south-east quarter, which, however, was invalid on account of a senior patent to James Durney. His claim to relief was based upon the conviction that the patent issued to Egerton granted the *south-east* quarter, and it is highly improbable, if possible, that he arrived at such conclusion *except after an examination of the patent itself under which he claimed.*

4. *The Act of March* 3*d*, 1827.

It is not to be presumed that Congress, of its own motion, and

without the request of the party to be benefited, or the knowledge of facts that justified action, passed the act for the relief of the legal representative or assignee of Giles Egerton.

The act, as a reason and justification for its passage, recites certain facts. It alleges that the quarter patented to Giles Egerton on the 10th day of January, A. D. 1818, had been previously patented to James Durney.

The Court ought not to presume, and will not presume until the contrary is shown, that the legislative department declared this to be a fact and gave it the sanction of a legal enactment without satisfactory proof of its truth. The patent itself, at that time in the possession of Egerton or his grantee, bearing the signature of James Monroe and the seal of the Land Office, was, doubtless, produced before the committee which examined and recommended the passage of the bill.

Either one of these considerations, The marginal entry, The statement of Egerton in his deed to Hart, The conduct of the subsequent grantees in regard to the title, or The action of Congress, would have justified the jury in concluding that the patent to Egerton, actually signed by the President, sealed and transmitted to Egerton, was for the *south-east* quarter, and not for the *north*-east quarter of Section 18.

Taken together they corroborate each other, and make a moral certainty that such was the fact.

They are only reconcilable with the conclusion that no matter what patent should have been and was intended to be issued to Giles Egerton, the patent signed, sealed and received by him, purported to grant the *south*-east quarter and not the *north*-east quarter.

The proof therefore shows that

II.

The legal title to the north-east quarter remained in the United States until the issue of the patent to Leonard.

The location of Egerton's bounty warrant upon the land did not convey to him the legal title.

It gave him a right to a conveyance, which right he could waive or relinquish.

To make a complete transfer of title from the United States, the law provided for the execution of a patent, signed by the President, sealed with the seal of the General Land Office, and countersigned by the Comissioner. §. 7, Act April 25, 1812 ; 1 Brightly's Digest, 465.

The legal title does not vest until the patent issues. Sweath *vs.* Corcoran, 13 Miss., (8 George) 513.

The title of the United States can only pass by patent or by Act of Congress in words of present grant. Wilcox *vs.* Jackson, 13 Peters, 499.

A patent carries the fee, and is the best title known to a court at law. Hooper *vs.*Scheimer, 23 Howard, 235.

It is a better legal title than a prior entry. Carman *vs.* Johnson, 20 Miss., (5 Bennett) 108.

A patent, though signed, sealed and recorded, may, before delivery, in case of mistake, fraud, &c., be recalled and corrected or cancelled.

Bell *vs.* Hearne, 19 Howard, 252.
Phillips *vs.* Shearman, 36 Ala., 189.
Opinion Atty. Gen., Land Laws, Vol. 2, page 28.
" " " " " 24.
" " " " " 6.
" " " " " 160.
" " " " " 86–87.
Regulations May 4 and 6, 1836, Vol. 2, page 92–93.

In Bell *vs.* Hearne, 19 Howard, 252, an entry had been made by John Bell, in 1839, but through a mistake the patent was made out to James Bell, in March, 1844, and forwarded to the District Land Office, where it remained until 1849, when the mistake was dis-

covered and the patent returned to the General Land Office and cancelled. Judgment creditors of James Bell, in July, 1844, levied upon the land, and the purchaser obtained a Sheriff's deed. This Court, in approval of the action of the Commissioner, and sustaining the title of John Bell against the grantees of James Bell, said :

The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice and to prevent the consequences of inadvertance, irregularity, mistake and fraud in the important and extensive operations of that officer for the disposal of the public domain.

The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department.

If the Commissioner has power to correct or cancel the original, surely he can amend an erroneous record, or note upon it a correction or cancellation of the original, or a variance between them, when discovered by comparison.

The counsel for the plaintiffs in error asserts that as the law directs the recording of patents, it is the record and not the execution that gives validity to the patent. He would make the clerical act of transcribing the patent more efficacious than its execution, including the signature of the President.

The authorities cited by him are mostly decisions in regard to Mexican grants. They are given in cases requiring a construction of the treaties between the United States and Mexico, or other countries, ceding territory, which treaties guaranteed to respect the grants made by such foreign country prior to the cession. They relate to the language both of the treaty and of the laws of the foreign country, and not to patents issued under the laws of the United States.

They were not cases where a variance was claimed between the record and the original. In U. S. *vs.* Vallejo, 1 Black. 552, the court decided that under the laws of Mexico and treaty of Guadalope

Hidalgo, a record in the public archives was necessary to substantiate an alleged grant.

They in no case decide that a patent from the United States, duly executed, is invalid unless it has been recorded in the General Land Office. Much less do they affirm that the record is the grant of lands from the United States, and is better evidence of the grant than the patent itself, or that the record is sufficient to vest title in the alleged grantee.

It is a matter of public notoriety that the records of patents in the General Land Office were, up to July, 1870, made not by copying from and comparison with the patent as executed, but by entering up a record of the patent as ordered or authorized to be issued, by reference to the data from which the original patent was prepared.

This was the usual practice at the time when the record upon which the marginal memorandum is entered was made up.

At the time the celebrated McGarrahan case was before Congress, it appeared from the communications of the Secretary of the Interior and the statement of the Commissioner of the General Land Office, as well as the affidavits of Clerks in the office, that—

"It was the usage and custom of the recorder's division in the office to make the record or copies of the patents before the signatures of the recorder and of the President, or his private secretary, were affixed thereto, and to make said records and copies complete, in anticipation of the signatures of said officers."

That such a usage prevailed when the record of patents for lands in the Illinois Military Tract was entered up, is apparent both from an inspection of the record books and from the legislation of Congress in regard to them.

If the full copy of the record had been set forth in the Bill of Exceptions, or the record itself in the Land Office were before the Court, it would disclose the initials of "J. M.," inserted as the signature of President Monroe, instead of the name "James Monroe,"

by which he signed official documents, and that the initials "J M.," appeared in place of the full name of the Commissioner.

To correct these variances and validate an imperfect record, Congress passed, March 3d, 1843, an act providing as follows :

Literal exemplifications of any such records, which have been or may be granted in virtue of the provisions of the 7th section of the act approved on the 4th day of July, 1836, entitled, "An act to reorganize the General Land Office," shall be deemed and held to be of the same validity in all proceedings, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record. 1 Brightly's Digest, §. 26, page 465.

It is to be noted that the act does not profess or attempt to cure any defect in the patents themselves, or make an unsigned patent valid, but to give the "literal exemplification of the record—the "same validity, when adduced in evidence, as if the names of the "officers signing or countersigning the same had been fully inserted "*in such record.*"

Will the Court hold these records infallible which Congress finds it necessary by legislation to perfect ?

Will it hold that such records that bear their own impeachment upon their face, are conclusive evidence of the contents of the original ?

Will it deny power to the custodian of the record to note thereon discrepancies between the original and the record, as at first entered, should such come to his official knowledge ?

Regarding it as established in this case, that title to the land in question did not pass from the United States until patented in 1868 to the grantor of defendant in error, I deem unnecessary any argument or authority to show that the tax title and occupancy of plaintiffs in error have no bearing as evidence in their favor.

Such tax title and occupancy, however, though introduced in evidence by plaintiffs in error, are very convincing proof of the

truth of my position: that Giles Egerton never had any title to the north-east quarter of section eighteen; in this, that such tax title and occupancy show that during all these years Giles Egerton has asserted no title to said land.

The patentee knows the description of the land granted by his patent. Self-interest prompts him to appropriate the land so granted; the absence, therefore, of any assertion of ownership by Egerton of the land in controversy, carries conviction to the mind that Egerton's patent was not a deed to him of such land.

Supplement this non-assertion of title to the *north*-east quarter with Egerton's claim to the *south*-east quarter in his deed to Hart, and the conclusion is irresistible that he had a patent for the *south*-east quarter and none for the *north*-east quarter.

In regard to the position of counsel for plaintiffs in error, that there may have been two Giles Egertons, one who received a patent for north-east quarter and the other for the south-east quarter.

I reply that if, as he claims, there is no presumption that there is only one Giles, there certainly is no presumption that there are two.

But I think he is mistaken in his view that identity of name does not raise a presumption of identity of person.

In almost every ejectment suit the rule is recognized that identity of name raises a presumption of identity of person.

Title is traced to John Doe, grantee. A subsequent deed, duly executed and acknowledged, from John Doe, grantor, for the same land, is received without proof of identity, upon the rule for which I contend.

Cowen & Hill's notes to Phillips, on evidence, 2d ed., page 1301, says: It is true there *may be* two persons of the same name, and that the presumption arising from identity of name may be erroneous and illusory. And the same objection could be urged against presumptive or circumstantial evidence in various other cases where it is undoubtedly admissable and *prima facie* sufficient. Where the fact

is shown that there is another person of the same name with the party who is alleged to have executed the instrument, further evidence might then be required, but until this appears it is difficult to see why the presumption adverted to should not stand.

See Atchinson *vs.* McCullock, 5 Watts, 13.
Jackson ex. dem. Schultz *vs.* Goes, 13 John., 518.
" " Woodruff *vs.* Cody, 9 Cowen, 140, 149, 150.
" " Bogert *vs.* King, 5 Cowen, 237.

But in this case Giles Egerton, grantor to Hart, conveying the S. E. ¼, says it was conveyed to him for his military services, by patent dated Jan. 10, 1818.

Here we have, in addition to identity of name, further description of person; 1st. That he had rendered government military service.
2nd. That he had received a patent therefor.
3d. That the patent was dated Jan. 10th, 1818.

If identity of name is generally sufficient where there is no proof that there are two of the same name, surely these three additional unusual circumstances must raise a presumption of identity of person.

Indeed, so far from there being any proof that there were two Egertons to whom, on the same day, were patented respectively the north-east quarter and the south east quarter of section eighteen, we have the strong negative proof that no patent was ever issued for the north-east quarter in this, that no Giles Egerton ever has asserted any claim to the land in question under such a patent.

III

ESTOPPEL.

Plaintiffs in error are estopped from setting up title in Egerton.

The plaintiffs in error claim the issue of a patent to Egerton for the land in question, either as a basis of title in themselves or as an outstanding title in him or in Hart. They can assert for or under him no better title than he could for himself or his grantees.

A person claiming title under one who is estopped, is also bound by the estoppel. McCrovey *vs.* Remsen, 19 Ala., 430; Phelps *vs.* Blount, 2 Dev., 177.

1st. Egerton, by the deed to Hart of the south-east quarter, and its recitals that his patent granted that tract, and by the successive conveyances from Hart to Shaw, with the acceptance by the latter of another quarter section from the United States in lieu of that quarter, became estopped from claiming that his patent granted him the north-east quarter.

Egerton, in his deed to Hart, recited that "the *south*-east quarter "which he therein conveys is the quarter granted to him by the "United States in consideration of his military services, as will ap- "pear by the patent obtained from the government January 10, 1818."

A person is always estopped by his own deed, and will not be allowed to aver anything in contradiction of what he has once solemnly and deliberately avowed. Lazon *vs.* Peeman, 3 Mis., 529.

A party cannot set up title in another contrary to the recitals in his own deed. Dern *vs.* Bowen, Coxe, 172.

The acts and admissions of a party operate against him in the nature of an estoppel, when in good conscience and honest dealing he ought not to be permitted to gainsay them. Ridgeway *vs.* Morrison, 29 Ind., 201.

Admissions which have been acted upon by others are conclusive against the party making them, in all cases between him and the party whose conduct he has thus influenced. McClellan *vs.* Kennedy, 8 Md., 230; Cummings *vs.* Webster, 43 Maine, 192.

2d. Egerton's successive grantees, Hart, Hunt, Clemson and Shaw, are bound and estopped by the recital and facts that estop Egerton.

A party who executes a deed is estopped from denying not only the deed but every fact which it recites, and all persons claiming under and through the party estopped are bound by the estoppel. Stowe *vs.* Wyse, 7 Conn., 214.

Parties and privies are estopped by recitals contained in a deed. Stewart *vs.* Butler, 2 S. & R , 381; Jackson *vs.* Parkhurst, 9 Wend., 209; Bush *vs.* Cooper's Adm'r, 18 Howard, 82; Robbins *vs.* McMillan, 26 Miss., (4 Cush.) 434.

A fact recited in a deed will be taken to be true against the parties to the deed and all claiming under them, and they are estopped forever from denying the truth of it. Inkeep *vs.* Shields, 4 Harring, 345.

It is evident that Egerton, Hart, and the subsequent grantees, intended to convey the tract for which Egerton had received a patent. Egerton says in his deed it is the same tract. Relying upon his assurances, Hart and the subsequent grantees purchased and conveyed the *south*east quarter. It is unreasonable to suppose that any one of them would have bought without faith in his grantor's title. Each acted upon the recital in Egerton's deed, satisfied by it that he was acquiring title to the tract Egerton patented. A mistake in the description is clearly shown, originating in the patent or in Egerton's deed. If the recital is true, it originated in the patent. No matter where first made, Hart and each successive grantee was equitably entitled to a correction of the mistake and to conveyances from preceding grantors, perfecting the title.

The obligation upon parties to make such corrections and the jurisdiction in chancery to enforce them, are unquestionable.

The equity invested in Hart by the intention of the parties and by the recitals in the deed was transferred by his and the subsequent conveyances to Shaw. The latter acquired an equitable title to a tract intended to be granted by an erroneous patent issued to, or an erroneous deed executed by, Egerton. If the recital in Egerton's deed was true, the United States, according to the testimony, had delivered to Egerton a patent for the wrong quarter, and to which it also had then no title. It would be the duty of the United States to correct such mistake or make restitution, and indemnify the last grantee, for whose benefit the correction would inure. He, being recompensed and fully satisfied, no one else would have cause of complaint. A settlement with Shaw—restitution to him—as last grantee would bind Egerton and every other grantor, as well as Shaw. The fact asserted in the recital was acted upon as true. The United States settled with Shaw for his claim and equity. Admit-

ting its own error in making Egerton's patent a grant for the *southeast* quarter, as asserted in Egerton's deed, it offered restitution more complete than the correction of the mistake by issuing to Egerton a patent following his location.

Instead of that, it authorized the grantee, "Egerton's legal representative or assignee," to select another quarter section. This was more advantageous to Shaw than to have the patent issued to Egerton for the northeast quarter. It obviated the necessity of mesne conveyances or proceedings in chancery to perfect his title. It also gave him the valuable privilege of choosing; perhaps, a better quarter section, and patenting it directly to himself. The offer was accepted by Shaw. His equity was satisfied by the entry of another quarter under the provisions of the act of Congress. He and his grantors are estopped from impeaching or ignoring a settlement of his claim, and from asserting title in avoidance of it. Neither Shaw, Hart, nor Egerton ever manifested any dissatisfaction with such settlement, or asserted title or claim to the northeast quarter subsequent thereto. Surely, a stranger will not be allowed to set up a title which they never have claimed, and would be estopped from asserting.

3. The recitals in the act of Congress of the 3d of March, 1827, and Shaw's entry of a quarter section under its provisions, also estop him from questioning the truth of the facts recited in the act. (Carey *vs.* Whiting, 48 Maine, 516.)

"The recitals in a private statute may be evidence between the Commonwealth and the applicant or party for whose benefit the act passed." (Elmondorf *vs.* Carmichael, 3 Litt., 472; Rex *vs.* Sutton, 4 Maule & Sel., 532; 3 Atk., 204.)

"Accepting a deed from a grantor acts as an estoppel." (Murphy *vs.* Barnett, 1 Law Rep., 106; Rossell *vs.* Wickham, 36 Barb., 386.)

The act asserts that the quarter patented to Egerton on the 10th day of January, A. D. 1818, had been previously patented to Durney. The latter's patent was for the southeast quarter. Egerton's patent, therefore, according to the act, granted that quarter. Shaw, Egerton's remote grantee, availed himself of its provisions; he must be held to admit its statements. The entry was to be in "lieu of" the quarter patented to Egerton, so that *it was a relinquishment by Shaw of whatever quarter that patent granted.* The act and the entry would estop Shaw, and all parties whose right or

title under the patent Shaw had acquired from claiming title under the Egerton patent.

In commenting upon the act of March 3d, 1827, and its recitals, the counsel for the plaintiff in error transfers the word "legal," which precedes and limits "representative" in the act, and prefixes it to "assignee." He says, (page 34 :) "Hart, who was the *only* '*legal* assignee' of Egerton, never availed himself of the act." A right of entry was given to the "legal representative or assignee" of Giles Egerton, "legal representative" as defined by this court in Hogan *vs.* Page, (2 Wallace, 607,) "embraces representatives by contract, such as assigns or grantees, as well as by operation of law," and would include Shaw. The words "or assignee" followed without limitation. The term "assignee" must be interpreted and applied in construing the act so as to carry out its intention. The act is meaningless if intended for the benefit of a grantee of the northeast quarter. He would need no relief. It offers indemnity where loss has been suffered, if the last grantee of the southeast quarter is the "assignee" intended.

4. The estoppel is available at law.

Plaintiff in error insists that "an estoppel in equity cannot be asserted in proceedings at law." Among the cases cited are three decisions in Illinois. The first is Wales *vs.* Bogue, (31 Ill., 468,) and upon it entirely the other two are based. In that case it was simply held "that the equitable title set up was not a bar to recovery in ejectment as against the legal title." No estoppel, in the proper sense of the term, was shown or claimed. They are not authorities against setting up an estoppel in this suit. If so, they are clearly overruled by the same court in a subsequent decision, (Gardner *vs.* Ladue, 47 Ill., 212,) in which the legal title was defeated in ejectment by an estoppel *in pais*.

Equitable matters creating an estoppel were recognized, among others, in the following cases as available at law.

French *vs.* Spencer, (21 Howard, 228.)
Frown *vs.* Wheeler, (17 Conn., 345.)
Corbett *vs.* Worcross, (35 N. H., 99.)
(8 B. Monroe, 542.)

"Where two persons, both bearing the same name, became "entitled to military bounty land, and a patent was issued

"to each for certain lands differently located, and in the "delivery of the patents a mistake occurred by which the "patent of one was delivered to the other, but both acted on "the facts of the case existing at the time and profited out "of the same without objection being made on the part of "either; Held, that *neither their grantees, nor any other per-"son*, could raise the question of such mistake in the delivery "of the patents; and that each of them, and their represen-"tatives, were estopped from claiming the land of the other." (Gardner *vs.* Ladue, 47 Ill., 212.)

This is directly in point and covers this case in principle.

Plaintiffs in error could acquire no title as against the United States by their tax deed and possession, for the reason that the land was not taxable when the tax was assessed upon it, and also because the statutes of limitation do not run against a State or the United States. (Gibson *vs.* Chanteau, 13 Wallace, 92; United States *vs.* Hoar, 2 Mason, 312; People *vs.* Gilbert, 18 Johnson, 228.)

Nor can they claim an equity or complain of hardship. Theirs, at least, is but a naked tax title. They set up a title in Egerton with which they have no connection and to which they claim no right. They and their grantors have been in possession of land for years which belongs, as they say, to Egerton or Hart. They have appropriated it to themselves and enjoyed the profits, paying no rents, and at no expense except the yearly taxes. They assert a title in Egerton to the northeast quarter, which neither he, nor Hart, nor any grantee of Egerton has ever claimed. They insist upon outstanding rights under a location which was relinquished and abandoned by the only parties who could claim title under it. They show no equity and no legal right. They have no title and are estopped from claiming title.

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